ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

Annual Report

2008

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

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Mission Statement

The Ontario Civilian Commission on Police Services is an independent oversight agency committed to serving the public by ensuring that adequate and effective policing services are provided to the community in a fair and accountable manner.

Ontario Civilian Commission on Police Services

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Ontario

The Honourable Rick Bartolucci
Minister of Community Safety and
Correctional Services
25 Grosvenor Street
18th Floor
Toronto, ON M7A 1Y6

Dear Minister:

Pursuant to the Memorandum of Understanding with the ministry, I am pleased to forward the Annual Report of the Ontario Civilian Commission on Police Services for the calendar year ending December 31st, 2008.

Yours sincerely,

Murray W. Chitra,
Chair

Chair's Message

As Chair of the Ontario Civilian Commission on Police Services, I am pleased to update the activities of the Commission during the calendar year 2008. I would like to begin by recognizing the hard work and commitment of Commission members and staff in meeting our legislative responsibilities.

Under the *Police Services Act*, the Commission has the authority to investigate policing-related matters and hold different types of hearings. During 2008, the Commission convened hearings or conducted investigations resulting in 10 disciplinary appeal decisions, one section 116 decision involving a labour relations issue and two section 40 decision(s) regarding the disbandment of a municipal police service. The Commission also carried out 568 reviews of decisions made by police services with regard to public complaints about police officer conduct, and police policies and services. In addition, the Commission received five requests to initiate a section 25 investigation. Of those requests, the Commission concluded one matter and another is still under consideration. The remaining requests were denied.

Detailed information on all of our proceedings held during the year can be found on our website at www.occps.ca

The upcoming year will bring significant change. Proclamation of the *Independent Police Review Act* in 2009 will transfer the responsibility for the oversight of public complaints about police officer conduct, and police policies and services to a new civilian oversight authority. The Commission, however, will retain its long-standing, adjudicative role as an appeal and decision-making body for both complainants and police officers seeking an appeal of police disciplinary hearings.

In 2009, the Commission will also be moving from our current location at 25 Grosvenor Street to a new downtown Toronto office. The new facility will make it easier for the public to access the services provided by the Commission.

Let me take this opportunity to reaffirm the Commission's historical commitment, as demonstrated through 47 years of responsive public service, and its ongoing responsibility to ensure the delivery of adequate and effective police services throughout Ontario.

Murray W. Chitra, Chair
Ontario Civilian Commission on Police Services

Role of the Commission

Mandate

The Ontario Civilian Commission on Police Services is an independent oversight agency of the Ministry of Community Safety and Correctional Services. It reports administratively to the Minister of Community Safety and Correctional Services.

The Commission is responsible for ensuring that adequate and effective police services are provided throughout Ontario. Its oversight powers are an important element of the civilian governance structure set out in the *Police Services Act*. To ensure compliance with the Act, the Commission has the authority to investigate policing-related matters, hold different types of hearings and make recommendations with regard to the nature and delivery of police services in a community.

Police services and police services boards are ultimately accountable to the public through the Commission.

Public Complaints

The Commission is currently responsible for overseeing public complaints against police involving officer conduct, and the policies and services provided by a police service. Members of the public, who are not satisfied with the outcome of the local police investigation into their concerns, may ask the Commission to review the matter.

When conducting a review, the Commission receives a complaint investigation file from the police service as well as submissions from the complainant. Commission case managers analyze the file and prepare a case summary to present to a review panel composed of Commission members.

The Commission may:

- confirm the decision of the Chief of Police/OPP Commissioner;
- refer it back to the involved police service or another police service for further investigation;
- find misconduct of a less serious nature; or
- order a disciplinary hearing.

As part of its oversight function, the Commission is provided with complaint statistics by all police services in Ontario.

Appeals

The Commission considers appeals of decisions at police disciplinary hearings arising from complaints about police conduct by members of the public or internal complaints

initiated by chiefs of police. The hearings are called by a chief of police about the conduct or work performance of a police officer, and are presided over by a hearing officer who is a police officer, a former police officer, judge or former judge. A public complainant and a police officer both have the right to appeal to the Commission in writing within 30 days of receiving notice of the outcome of a disciplinary hearing. After hearing submissions, the Commission may:

- confirm, vary or revoke the decision of the disciplinary hearing;
- substitute its own decision; or
- order a new hearing.

In fulfilling its appellate role, the Commission ensures that the decision of the hearing officer is based on facts established by the evidence at the hearing, and reflects the proper application of the law.

Investigations and Inquiries

The Commission may investigate and inquire into the administration of a municipal police service, the manner in which policing services are being provided, and the policing needs of a municipality. The Commission may be directed by the Lieutenant-Governor-in-Council to hold an inquiry into any matter relating to crime or law enforcement. As well, the Commission may independently investigate and inquire into the conduct or work performance of police officers, chiefs of police, members of local police services boards, auxiliary members of a police service, special constables and municipal law enforcement officers.

Hearings

As a quasi-judicial body, the Commission has specific authority to investigate and hold different types of hearings to ensure compliance with the Police Services Act. The Commission:

- decides disputes between local police services boards and municipal councils about annual police budgets;
- approves the restructuring of municipal police services;
- determines whether or not a disabled member of a police service has been accommodated;
- rules on disputes about membership in municipal police bargaining units;
- approves the appointments of First Nations Constables to perform specified duties in designated geographic areas; and
- rules on whether or not prescribed standards of police services are being met.

Chiefs of police, and members of police services and police services boards are held accountable and public safety is enhanced through the Commission's civilian oversight powers.

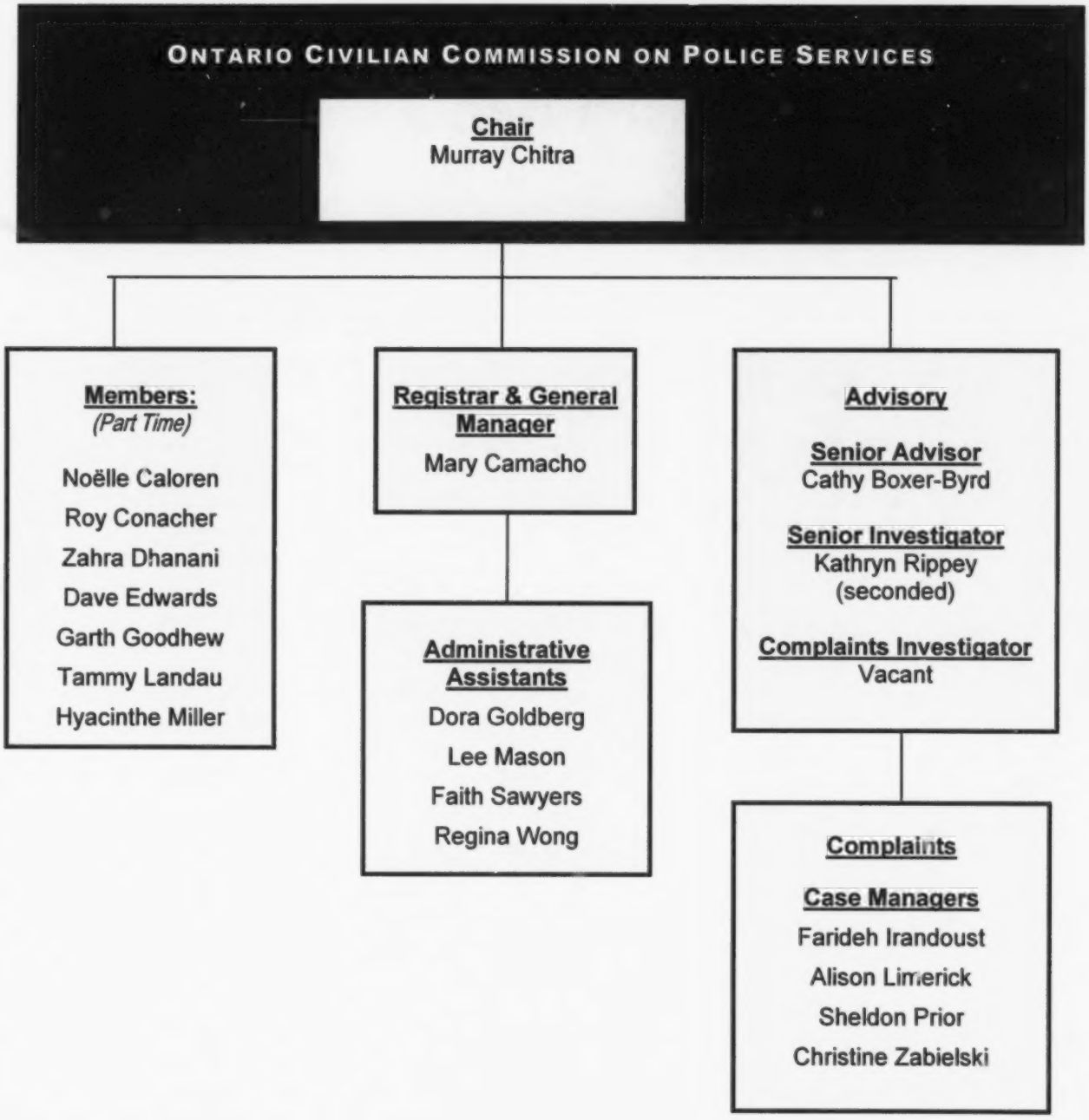
Commission Organization

The Commission is made up of a full-time Chair and seven part-time members.

Members are appointed by Order-in-Council for terms of two, three and five years, and represent a diverse cross-section of professions and communities from across Ontario. They have extensive backgrounds in law, education, community advocacy, human rights, corrections, victims' rights issues, and in the fields of criminal and aboriginal justice. Members are supported in their role by advisory, investigative and administrative Commission staff.

In addition to attending regular monthly meetings at the Commission's Toronto offices, members participate on in-house panels to review how local police services have classified and investigated public complaints dealing with officer conduct, and police policies and services. Commission members are also selected to hear disciplinary appeals.

ORGANIZATION CHART 2008



Commission Budget 2008

The annual budget for the Ontario Civilian Commission on Police Services for the calendar year 2008 was $1,685,200.

The following is a breakdown of the allocated budget:

ITEM	ALLOCATION ($000)
Salaries & Wages	1,457.70
Employee Benefits	151.90
Transportation & Communications	37.80
Services	27.60
Supplies & Equipment	9.20
Other	1.00
Total	1,685.20

Members of the Commission

Murray W. Chitra - Chair

Prior to his appointment to the Chair of the Commission, Mr. Chitra was the Legal Director of the Ontario Insurance Commission (OIC) for four years. As well, Mr. Chitra worked for ten years with the Legal Services Branch of the Ministry of Correctional Services assigned for six years as Legal Director. He was called to the bar in Ontario in 1980. Mr. Chitra is the former President of the Society of Ontario Adjudicators and Regulators (SOAR) and a member of the Board of Canadian Administrative Tribunals (CCAT).

Noëlle Caloren

Noëlle Caloren is a lawyer who was called to the Ontario Bar in 1995. She practises law in a large national Canadian law firm. With a background in general litigation, Ms. Caloren has developed an expertise in employment and labour law, human rights and education law matters. Over the last six years, Ms. Caloren has taught Civil Procedure at the Bar Admission Course of the Law Society of Upper Canada. She is also a contributing author to a comprehensive employment law text Employment Law – Solutions for the Canadian workplace. Ms. Caloren is fluently bilingual.

Roy B. Conacher

Roy B. Conacher is a senior partner with an Eastern Ontario Law firm. He was called to the Bar in 1971 and after practising in Toronto for several years moved to Eastern Ontario. He has served on many boards and tribunals during his career including appointments as Co-Chair, Ontario Psychiatric Review Board; Regional Vice-Chair, Ontario Consent & Capacity Board; Independent Chairperson, Federal Penitentiaries Act; and Deputy Judge (Small Claims). Mr. Conacher has also served as a Municipal Councilor; as Chair of the Professional Division, Eastern Ontario United Way Campaign; and a Director of a local Rotary Club. His practice now concentrates on real estate development and municipal law.

Zahra Dhanani

Zahra Dhanani is the legal director of a prominent women's organization. Called to the Bar in 1999 after studying at Osgoode Hall Law School and receiving her LL.B., Ms. Dhanani is currently completing her LL.M in Alternative Dispute Resolution with a focus on restorative justice. During her legal career, Ms. Dhanani has worked at various community legal clinics, run her own law practice and has participated in various social justice projects. She has specialized in mediation, human rights and immigration/refugee law.

Dave Edwards - Member

Dave Edwards has been a partner in a Niagara Region Law firm since 1978 practicing primarily in the areas of corporate and commercial law. During his professional career he has served on a number of community organizations and held a number of positions, including: Chair of the Board of Trustees of Brock University, President of the United Way of his Municipality and District, Member of the Niagara District Airport Commission, and a Member of the Boards of Directors of The Alzheimer Society of Niagara and the Rotary Club.

Garth Goodhew – Member

Garth Goodhew spent most of his professional career in secondary education in Northern Ontario serving 23 years as a Principal. Throughout his career he served on a variety of boards and agencies, was a member of his Municipalities City Council and chaired the National Candidature Committee of the United Church of Canada. He received the Queen's Silver Jubilee Medal for community service. After leaving secondary education Garth completed 6 years as a Board member in the Ontario Region of the National Parole Board. At the present time he is a Member of the Citizens' Advisory Committee for the Sudbury Region of Correctional Service of Canada.

Tammy Landau – Member

Tammy Landau is Associate Professor in the School of Criminal Justice at Ryerson University. She has a PhD in criminology from the Centre of Criminology at the University of Toronto, and has been involved in a wide range of community projects and agencies. Dr. Landau has been a consultant to federal, provincial and local governments on a variety of justice issues. Her research interests include policing, Aboriginal justice and victimology.

Hyacinthe Miller - Member

Following graduation from university, Ms. Miller worked in the private sector and for the federal and provincial governments in Ontario. She has also been active in various community agencies. During her career, Ms. Miller has been a senior manager, a technology consultant and general advisor to federal and provincial government ministries and central agency officials, law enforcement agencies and civilian oversight organizations. Currently an organizational development consultant, Ms. Miller is also the former Executive Director of the Canadian Association for Civilian Oversight of Law Enforcement.

The members of the Commission are representative of all areas of the Province including the Northern, Southern, Eastern and Western regions.

Outreach – Ongoing Initiatives with Community and Police Stakeholders

Each year, the Commission actively engages police officers and civilian staff of police services and police services boards in discussions about their roles in police governance and civilian oversight. The ultimate goal is to ensure understanding of the Commission's work and Ontario's current public complaints system.

Members of the Commission lend their time and expertise in promoting general awareness of legislative requirements and specific operational responsibilities. Opportunities for open dialogue – both formal and informal - include annual conferences/zone meetings of the Ontario Association of Chiefs of Police, Ontario Association of Police Services Boards and the Police Association of Ontario.

The Commission is regularly invited to participate in ongoing education and training programs offered by the Ontario Police College and the Ontario Provincial Police Training Academy. Presentations are made to Professional Standards officers as well as senior officers and legal staff who have investigative and administrative responsibilities within the complaints and appeal processes.

Commission Chair Murray Chitra travelled to Regina, Saskatchewan where he spoke to the annual conference of the Canadian Association for the Civilian Oversight of Law Enforcement on the subject of civilian governance. Also, he delivered a keynote address on ethics and integrity at a conference hosted by the Immigration and Refugee Board of Canada.

The Commission was pleased to be able to organize a workshop on internet-based case management systems at an international conference of administrative tribunals. Also, the Commission is leading a website committee for the Society of Adjudicators and Regulators.

Inquiries, Investigations and Fact-Finding Reviews

Section 25 of the Police Services Act provides that the Commission may at the Minister's request, a municipal council's request, a board's request or of its own motion, investigate, inquire into and report on:

- the conduct or the performance of duties of a police officer, a municipal chief of police, a special constable, a municipal law enforcement officer or a member of a board;
- the administration of a municipal police force;
- the manner in which police services are provided to a municipality; or
- the police needs of a municipality.

Initiation of a section 25 inquiry is a serious, resource-intensive process with the potential for negative consequences for members, chiefs of police and police services boards. These can include demotion, dismissal, suspension or revocation of an appointment.

In 1998 the Commission initiated an innovative approach to addressing those issues that were deemed to be of concern, but not falling within the parameters of a full-scale inquiry – the Fact-Finding review. This approach continues today.

In 2008, the Commission received five requests for section 25 investigations. Issues included: labour relations; the conduct of the chair of a municipal police services board; the manner in which municipal police services boards dealt with public complaints and the release of information; and, the conduct of a chief of police.

Upon review, it was decided that three of the requests did not warrant invoking the Commission's extraordinary powers contained in section 25. An investigation was commenced into the conduct of a member of a police services board and concluded with no misconduct found. The final request remains under consideration.

Section 116 Status Hearings

Municipal police forces in Ontario are composed of "members" who are appointed by local police services boards. Section 2 of the Police Services Act defines "members" to include both police officers and civilian employees.

The Act permits members to form associations for the purposes of collective bargaining. Normally, there are two associations: one for officers and civilians, and another for senior officers. Under section 115(2) chiefs and deputy chiefs are excluded from this scheme.

From time to time a dispute arises as to whether or not a particular member should be assigned to the local police association or senior officers association. Section 116 of the Act sets out a process to resolve such disagreements. It states:

> 116(1) If there is a dispute as to whether a person is a member of a police force or a senior officer, any affected person may apply to the Commission to hold a hearing and decide the matter.
>
> (2) The Commission's decision is final.

There was one section 116 status hearing before the Commission during 2008. A summary of this decision follows. The full text of previous section 116 status decisions can be found on the Commission's web site at www.occps.ca.

JOHN M. CHAMBERS
Applicant

AND

CHATHAM-KENT POLICE SERVICES BOARD
Respondent

Presiding Members:
Murray W. Chitra, Chair
Noëlle Caloren, Member

Appearances:
David S. Thompson, for the Applicant
Glenn P. Christie, for the Respondent

Heard:
October 15, 2007

Date of Decision:
February 26, 2008

Summary of Reasons for Decision

John Chambers, who began his career with the Tilbury Police Service in 1973 and rose to the rank of Chief, brought an application pursuant to section 116 of the *Police Services Act* for determination of his status as a member of the Chatham-Kent Police Service. Section 116 provides that a person may apply to the Commission to hold a hearing and decide the matter if there is a dispute as to whether he/she is a member of a police service or is a senior officer.

In 1998, the Tilbury Police Service amalgamated with a number of other police services to form the Chatham-Kent Police Service. In 2000, Mr. Chambers became Deputy-Chief. His employment was covered by a contract which had no fixed term. In 2002, the parties entered into a new contract with a fixed, three-year term expiring on December 31, 2005. This agreement contained a termination provision, section 6.01(b). It stated that the Deputy Chief's appointment would terminate automatically upon the expiration of the agreement unless "extended by mutual agreement".

The contract was not renewed when it expired in 2005. Mr. Chambers brought an application before the Ontario Superior Court of Justice, arguing that section 6.01 (b) was a form of dismissal not authorized under the *Act*. The court ruled that section 6.01(b) was void and unenforceable. On appeal, the Ontario Court of Appeal ruled the section was not void and set aside the earlier court ruling. The Court of Appeal subsequently referred to the Commission the issue of whether Mr. Chambers

continued to hold office as a police officer and a member of the Chatham-Kent Police Service.

Appearing before the Commission, counsel argued that termination of the Deputy Chief appointment did not result in the loss of Mr. Chambers' status as a police officer and member of the police service. Counsel argued that termination of any police officer could only be carried out under specific provisions of the *Act*, none of which had been invoked in this case. Counsel for the Chatham-Kent Police Service argued that expiry of the agreement severed any relationship that Mr. Chambers had with the Chatham-Kent Police Services Board. Counsel pointed out that the contract did not provide a rank for Mr. Chambers to assume after December 31, 2005.

The application was dismissed.

In upholding the validity of section 6.01(b), the Court of Appeal noted that expiry of a fixed- term contract does not constitute dismissal, pursuant to an earlier decision of the Supreme Court of Canada. Moreover, many public office holders were subject to fixed terms, so there was nothing objectionable about entering into a fixed-term contract with a chief or deputy chief, unless the termination provision was used as a "colourable device".

However, in this case, the Commission found that there was nothing to suggest that the fixed term had been used to subvert Mr. Chambers' independent decision-making authority, or as a form of disguised discipline, or as a means of reducing the size of the force.

Instead, in the most recent contract, Mr. Chambers had simply agreed to a time-limited appointment. There was no provision for a continuing relationship beyond the expiry of the agreement. In addition, the presence of a non-disclosure/confidentiality clause in the agreement supported the inference that the parties did not intend Mr. Chambers to return to the service in some capacity; otherwise, such a clause would not be necessary.

Accordingly, the Commission concluded that Mr. Chambers' appointment as Deputy Chief, his status as a police officer and his status as a member of the Chatham-Kent Police Service ended on December 31, 2005.

Police Service Restructuring

Section 40 of the Police Services Act allows police services boards to terminate the employment of a member of a police force for the purpose of abolishing the force or reducing its size if the Commission consents and if the abolition does not contravene the Act.

When a municipality requests the approval of the Commission for the disbandment or downsizing of their police service, they must supply the Commission with a copy of a resolution passed by municipal council. The Commission requests a copy of the proposal for the provision of alternative policing services and also ascertains whether severance arrangements have been made with those members whose employment would be terminated if the proposal is accepted.

It is not the Commission's function to judge whether or not what is being proposed is economical or superior to what may already be in place or any other alternative. The Commission's focus is to determine whether the proposed arrangements meet the requirements of the Act. It is not the function of the Commission to determine what constitutes appropriate severance arrangements. That is a matter for bargaining between the parties and, in the absence of agreement, for arbitration.

A public meeting is held to hear presentations and receive submissions. Following the completion of the meeting, the Commission renders a written decision.

During 2008, the Commission approved the disbandments of municipal police services in the City of Kenora and the Town of Essex in favour of contract policing by the Ontario Provincial Police. A summary of these decisions follow. The official text of this and previous restructuring decisions can be found on the Commission's web site at www.occps.ca or obtained through the Commission office.

ESSEX POLICE SERVICE
Application for Consent to Abolish

Presiding Members:
David Edwards, Member
Hyacinthe Miller, Member

Appearances:
Inspector Rick Derus, Essex OPP Detachment Commander
Tom Gervais, Police Services Advisor, Ministry of Community Safety and Correctional Services
Chief Roger Hollingworth, Amherstburg Police Service
Wayne Miller, CAO, Town of Essex
Constable Mike Primeau, President, Essex Police Association
Sergeant Dino Tsitomeneas, OPP Contract Policing Bureau

Heard:
September 8, 2008

Date of Decision:
October 31, 2008

Summary of Reasons for Decision

The Town of Essex and its police service were created resulting from the amalgamations of four former townships and their corresponding police services. Following a number of public information meetings and open houses, the Town passed a resolution accepting an Ontario Provincial Police (OPP) contract policing proposal. Subsequently, the Town wrote to the Commission on March 27, 2008 seeking approval to disband its police service.

Section 4(1) of the *Police Services Act* requires municipalities to provide adequate and effective policing. This includes sufficient staff, administration, equipment, infrastructure and facilities to fulfill five core police functions: (i) crime prevention; (ii) law enforcement; (iii) assistance to victims of crime; (iv) maintenance of public order; and, (v) emergency response. Section 40 of the *Act* requires that the Commission consent to disbandment only if there is an agreement in place dealing with severance issues; if not, and if the parties do not agree to proceed to arbitration, the Commission can direct them to do so as a condition of consenting to the disbandment.

Therefore, this application for disbandment required the Commission to consider two issues: whether the proposal would provide adequate and effective police services; and, whether employment matters had been dealt with on a fair and reasonable basis. The proposal by the Town of Essex proposed using the existing police service building, which would become one of four satellite detachments within the new Essex OPP

structure. All uniform and civilian members with the Essex Police Service were offered employment with the OPP.

In terms of uniform resources, residents would experience virtually no reduction in the number of officers available; in fact, the number of officers assigned to community service activities within the Essex OPP area would be increased. Also, the Town would have access to 32 auxiliary OPP officers, a resource that it did not have previously. The Commission found that the proposed staffing levels and the span of control were favourable and reasonable, while police officer workload would be manageable.

In terms of civilian resources, the proposed allocation would enhance delivery of resources within the detachment area.

The existing police service building had been renovated, but still did not meet provincial standards for full barrier-free access. In addition, the cell area required upgrading. However, the proposal provided for a number of renovations and upgrades to bring the facility up to provincial standards.

Communications would be coordinated by staff located in London. An exterior mounted telephone would be installed for public access when the Essex satellite detachment front office is closed.

Overall, the proposal addressed the five core police functions in section 4(2), and it appeared to meet the criteria for human resources, vehicles and equipment, training and facilities. The residents of the Town of Essex would, therefore, continue to receive adequate and effective policing.

Discussions were continuing between the Essex Police Services Board and the Chief and Deputy Chief with respect to the future of their employment with the Board. The parties were directed to proceed to arbitration with outstanding severance issues, if any.

Subject to confirmation of the completion of barrier-free and cell renovations, and subject to the proposal being implemented without alteration, the Commission consented to the disbandment of the Essex Police Service.

KENORA POLICE SERVICE
Application for Consent to Abolish

Presiding Members:
Murray W. Chitra, Chair
Roy B. Conacher, Member

Appearances:
Persons attending the hearing included representatives from: the City of Kenora, Consultants on Police Services Inc., the Ontario Provincial Police (OPP), Kenora Police Services Board, Kenora Police Service, Kenora Police Association, Ministry of Community Safety and Correctional Services, area First Nations, and various citizens.

Heard:
September 11, 2008

Date of Decision:
December 18, 2008

Summary of Reasons for Decision

The City of Kenora applied to the Commission for consent to disband the municipal police service.

Kenora was created by the amalgamation of the former Town of Kenora and the adjacent Townships of Keewatin and Jaffray-Melick. All municipal services were amalgamated except for policing. In a hybrid policing arrangement, the former Town retained its municipal police service, while the neighbouring townships were policed by the OPP.

The City is policed by a total of 47.12 uniform officers from the municipal service and the OPP. The service employed a number of civilian staff: two special constables, 12 guards, two office workers, nine dispatchers and four by-law enforcement officers. The OPP provided .7 contract civilian positions. The municipal service and OPP had separate stations or facilities. Both services were well-equipped and had their own dispatching. OPP dispatching is located in the Provincial Communications Centre - Thunder Bay.

As a result of a decline in local industry, a loss of jobs and residents, and a reduction in municipal revenues, the City retained consultants to review the hybrid arrangement. After considerable public discussion, the consultants recommended that the City move to a single police service provider. Accordingly, an RFP was prepared with both the OPP and the Kenora Police Service submitting proposals. The OPP emerged as the successful bidder.

Subsequently, the City sought the Commission's consent to disband the municipal police service. The Commission requested information from the City and the Kenora Police Services Board, and scheduled a public meeting in Kenora. Meanwhile, the Kenora Police Services Board brought an application in the Ontario Superior Court of Justice for an injunction prohibiting the abolishment of the police service. The application was dismissed by Justice G.P. Smith (see JR-DSB #08-02), who ruled that only the municipal council had the authority to decide to disband. The court ruled that the board's consent was not required.[1]

The Commission held a public meeting where the OPP made its presentation. Oral submissions and one written submission raised a number of concerns with the substance and process of the OPP proposal.

The OPP detachment had a complement of 47 uniform officers. The OPP proposal called for an integrated detachment of 82 officers: 42.56 allocated to the City and 39.44 to the other areas within the detachment. Existing patrol zones would be maintained, with seven constables per platoon. The proposal also called for 11 civilian support staff: seven allocated to the City and four to other detachment areas.

The current OPP detachment facility and the municipal police station would both be used, with renovations to the latter. Both facilities would be open to the public during normal business hours with all dispatching to take place from the OPP Provincial Communications Centre -Thunder Bay.

Employment of the Kenora Police Service's four by-law enforcement officers would be transferred to the City. All uniform officers would be offered employment with the OPP, while part-time contract guards would be moved to the OPP call-out roster. The proposal also called for the creation of six civilian positions - two clerical, two data entry and two special constables – to be offered to civilian members of the Service.

The existing Police Services Board would be replaced by a board which would exercise the powers under section 10(3) of the *Police Services Act (*Act).

The role of the Commission under section 40 is two-fold: to ensure the adequacy and effectiveness of policing under the alternate service delivery model; and, to ensure that severance arrangements were in place for any members who were subject to termination.

The first role relates to issues of community safety and provincial standards; the second requires the Commission to assess whether employees, adversely affected by a change in delivery of policing services, are being treated fairly.

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[1] The Board's appeal of this decision was withdrawn.

Section 4 of the Act prescribes certain aspects of adequacy and effectiveness. One of these is staffing. In that regard, the OPP proposal represented a loss of 4.56 officers from the current City complement. The City has a high crime rate that is 2.6 times the provincial average. The reduction in complement would mean too high a workload. Each officer would have to respond to 1:54.6 crimes per year, which exceeds the workload benchmark approved by the Commission in previous disbandment decisions, 1:43 to 1:51.

Rather than reducing the complement by 9.7%, the Commission directed that the complement be increased by five for a total of 47.56 officers. Four of these would be front-line constables, one assigned to each of the detachment's four platoons, bringing the number of constables per shift to eight. The fifth officer would be assigned a community services role, working with First Nations and other community groups.

Under the proposal, both buildings would continue to be used. Although both would be open to the public only during normal business hours, citizens would continue to have 24-hour policing coverage. All dispatching would be done from the Provincial Communications Centre - Thunder Bay. Previous examinations of the Centre revealed that it was more than adequate, and there is no reason to believe that this would not also be the case for the City.

With the addition of five officers and the completion of renovations to the existing municipal police building, the OPP proposal would permit the City to continue providing adequate and effective policing in compliance with the requirements of the Act and Ontario Regulation 3/99.

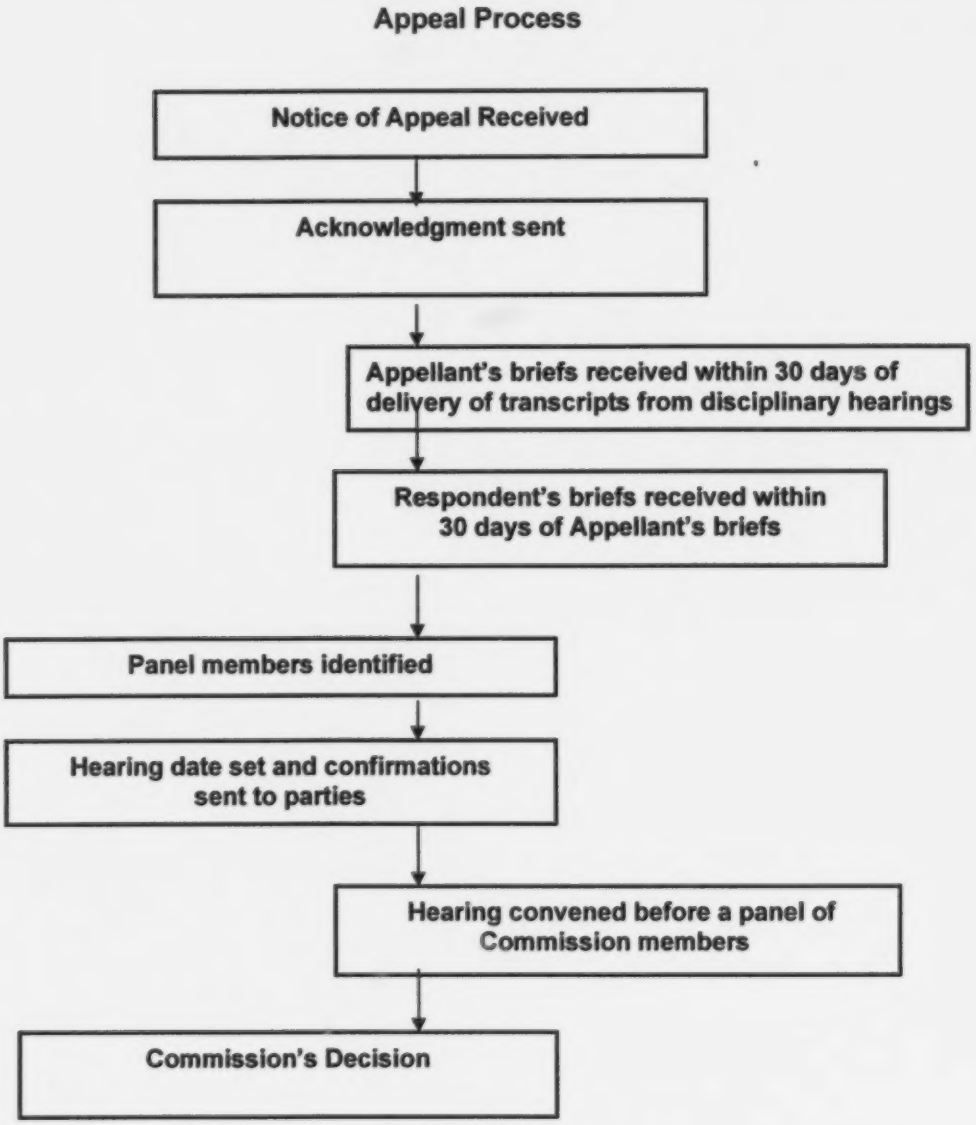
Under the OPP proposal, some civilian members of the Kenora Police Service would lose their jobs. At the public meeting, reference was made to that section of the collective agreement dealing with severance. Neither the Chief nor the Deputy Chief of Police had any agreement with respect to severance pay. In addition, a possible pension shortfall for transferred members was identified. As of the date of the hearing, the Police Services Board had not discussed these issues with its employees even though it is under a statutory duty to do so as part of overseeing a smooth transition.

The Commission approved the application for consent to disband the Kenora Police Service, subject to conditions. They include the:

- addition of five constables;
- completion of renovations to the City facility;
- OPP providing and processing applications for transfer of uniform members;
- OPP establishing a process for filling the six civilian vacancies;
- Board entering into good faith severance negotiations with the Chief and Deputy Chief, failing which the parties were directed to proceed to arbitration;
- Police Services Board entering into good faith negotiations with the Association to resolve outstanding pension issues for transferred employees, failing which the parties were directed to proceed to arbitration;

- Board providing City Council and the OPP with information to assist in an orderly disbandment; and,
- Board providing the Commission with a report within 60 days outlining the steps it has taken to comply with these directions.

Disciplinary Appeals Process


Appeal Process
Notice of Appeal Received
Acknowledgment sent
Appellant's briefs received within 30 days of delivery of transcripts from disciplinary hearings
Respondent's briefs received within 30 days of Appellant's briefs
Panel members identified
Hearing date set and confirmations sent to parties
Hearing convened before a panel of Commission members
Commission's Decision

Summary of Disciplinary Appeal Decisions

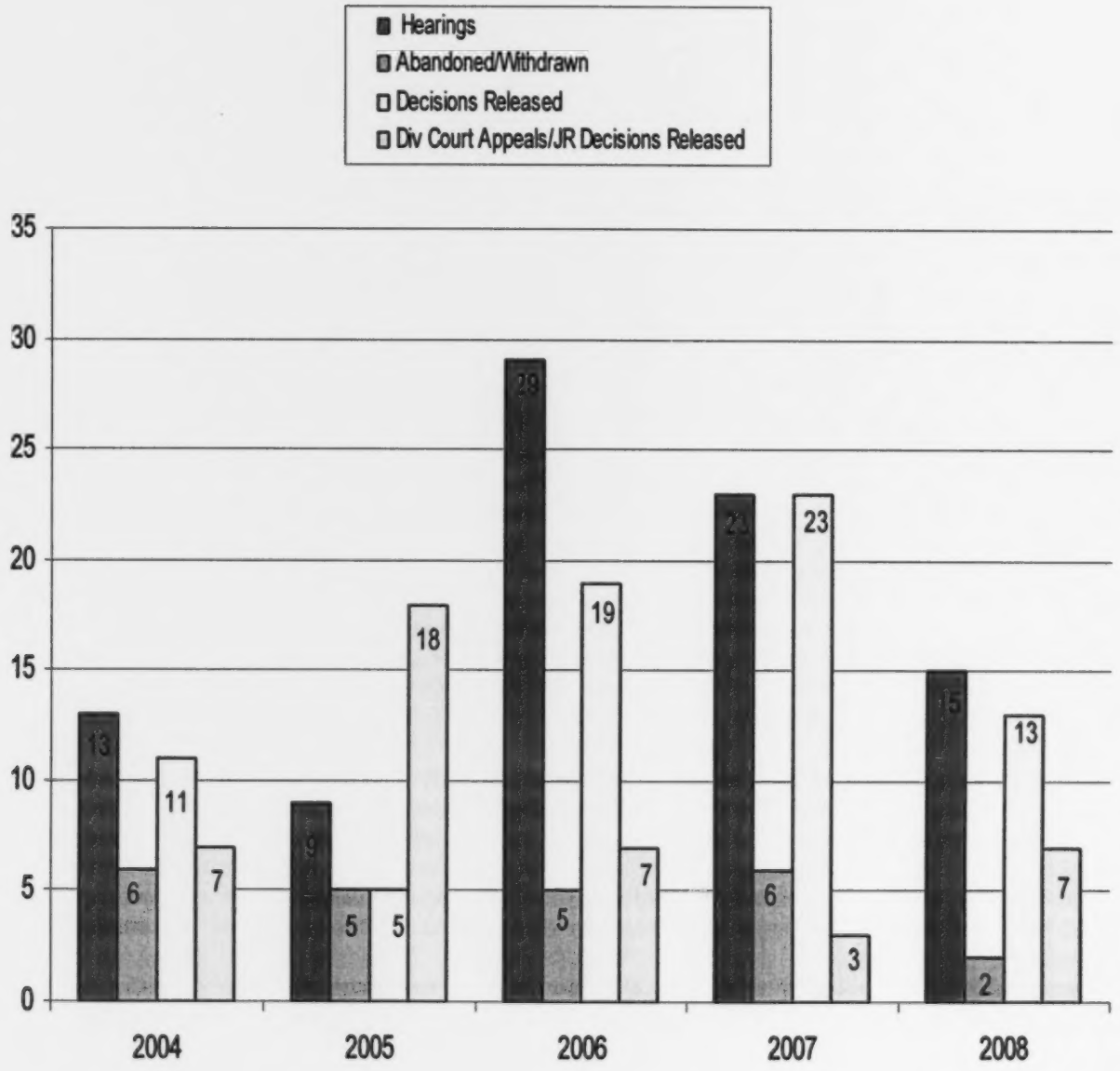
During 2008, the Commission heard 10 disciplinary appeals.

The following list identifies the appellant, respondent, the police service and the date and outcome of the decision. Summaries of these decisions are included in this report. The official text of the full decisions can be found on the Commission's web site at www.occps.ca.

DATE OF DECISION	COMPLAINANT/POLICE OFFICER/POLICE SERVICE	RESULT
April 22, 2008	Constable Alec Moraru/Ottawa Police Service	Conviction – discreditable conduct. Penalty – resignation within seven days or dismissal. Appeal of penalty allowed – varied to demotion to third-class constable for one year.
May 2, 2008	Constable David Moore/Ontario Provincial Police	Conviction – neglect of duty. Penalty – reprimand. Appeal of conviction dismissed.
July 15, 2008	Constable James Vaughan-Evans/Toronto Police Service	Conviction – discreditable conduct. Penalty - resignation within seven days or dismissal. Appeal of penalty dismissed.
July 28, 2008	Constable Chris Maguire/Peterborough-Lakefield Community Police Service	Conviction – neglect of duty. Penalty – loss of five days. Appeal of penalty dismissed.
July 30, 2008	Constable William Yakimishyn/Peel Regional Police Service	Conviction – discreditable conduct. Penalty – forfeiture of five days or 40 hours. Appeal of penalty allowed - varied to forfeiture of 20 hours.

August 14, 2008	Constable Scott Hampel/Toronto Police Service	Conviction – insubordination. Penalty – forfeiture of seven days or 56 hours. Appeal of conviction dismissed; appeal of penalty allowed - varied to forfeiture of three days or 24 hours.
October 3, 2008	Constable Ryan Venables/York Regional Police Service	Conviction - misconduct. Penalty – resignation within seven days or dismissal. Appeal of penalty dismissed.
October 3, 2008	Duane Simon/Constable Dawn Lauryssen/Peel Regional Police Service	Preliminary motion of alleged bias dismissed. Appeal of not guilty finding on a charge of discreditable conduct. Acquittal upheld.
November 26, 2008	Constable J.J. Devine/Ontario Provincial Police	Conviction – discreditable conduct. Penalty – demotion from second-class to third-class constable for two years. Appeal of penalty allowed - demotion varied from a period of two years to one year.
December 12, 2008	Constable Wendy Gardner/Ontario Provincial Police	Conviction – discreditable conduct. Penalty – forfeiture of 40 hours. Appeal of conviction allowed and conviction set aside.

HEARING ACTIVITY CHART



Summary of Disciplinary Appeal Decisions

CONSTABLE ALEC MORARU
Appellant

AND

OTTAWA POLICE SERVICE
Respondent

Presiding Members:
Roy Conacher, Member
David Edwards, Member
Hyacinthe Miller, Member

Appearances:
Michael A. Crystal, for the Appellant
Robert A. Houston, Q.C., for the Respondent

Heard:
February 22, 2008

Date of Decision:
April 22, 2008

Summary of Reasons for Decision

First-class Constable Alec Moraru of the Ottawa Police Service pleaded guilty to one count of discreditable conduct, contrary to section 2(1) (a) (ix) under the *Police Services Act*. He appealed the penalty imposed by the Hearing Officer – resign from the police service within seven days or face dismissal. Constable Moraru has been a police office with the Ottawa Police Service and its predecessors since 1993. Except for one prior disciplinary matter in 1998 which was resolved informally, the officer has an exemplary employment record. The prior incident followed the suicide death of an officer in Constable Moraru's platoon, for whom he had acted as coach officer.

The incident leading to Constable Moraru's dismissal occurred in December 2004. While off-duty, he brought a briefcase into a Loblaws store and shoplifted cheese, chocolate and shaving lotion. Other items were paid for at the check-out. Video surveillance cameras in the store captured the officer's actions, but not the actual placing of the items into the briefcase.

A security officer stopped Constable Moraru outside the store and asked the officer to accompany him back inside; however, when the police were called, Constable Moraru fled. In the process, he hit one of the security officers in the arm and indicated that he had a gun. Later that day, Constable Moraru was arrested and charged with theft under $5000, uttering a threat and assault with intent to prevent a lawful arrest.

At his criminal trial in April 2006, Constable Moraru pleaded not guilty on the grounds that he was not criminally responsible for his actions based on Post-Traumatic Stress Disorder (PTSD), an ongoing condition from which he has suffered for six years following the suicide death of his colleague. The PTSD was apparently prolonged or aggravated by other work-related issues as well. The trial judge accepted that Constable Moraru was suffering from PTSD, but ruled that the officer did not meet the legal test for establishing that he was not criminally responsible. However, the trial judge did describe Constable Moraru's behaviour as "bizarre", and accepted PTSD as a mitigating factor during the sentencing phase of the trial. Accordingly, the judge gave Constable Moraru a conditional discharge, placed him on probation for 12 months, assigned the officer 120 hours of community service and ordered him to undergo counselling and to stay away from any Loblaws store.

Following the criminal trial, Constable Moraru was charged under the *Police Services Act* with one count of discreditable conduct. At the subsequent disciplinary hearing, the officer testified that he had been in a dream-like state during the shoplifting incident and could not recall what happened after a certain point. Expert medical testimony at the hearing confirmed the diagnosis of PTSD, its characteristic features and the fact that the Appellant's conduct before, during and after the incident was consistent with observed PTSD behaviour patterns. The expert evidence also indicated that Constable Moraru was making a good recovery, had good insight and support, and would be able to return to work.

While the Hearing Officer accepted the diagnosis of PTSD, he did not accept that the symptoms of the disorder "controlled" Constable Moraru's actions on that day. The Hearing Officer found that the theft was deliberate and planned. Focusing on the seriousness of the misconduct, he concluded that Constable Moraru should not be allowed to rejoin the police service.

Counsel for the officer argued that the Hearing Officer: (i) committed a manifest error by failing to connect the Appellant's illness and his behaviour at Loblaws; (ii) erred in principle by rejecting the expert evidence; and, (iii) erred by failing to give sufficient consideration to the various mitigating factors. Counsel also stated that the reputation of the Ottawa Police Service would be damaged if it was seen by the public to dismiss an employee who became mentally ill as a result of being on the job. Counsel for the Respondent argued that the Hearing Officer was correct in finding that Constable Moraru's actions were conscious and deliberate rather than controlled by his illness. Counsel also asserted that there were no errors in the Hearing Officer's decision. The three key elements in considering an appeal from the penalty imposed were: (i) nature and seriousness of the misconduct; (ii) rehabilitative potential; and, (iii) damage

to the reputation of the Ottawa Police Service if the officer remained employed. In this case, the Hearing Officer fully explored the seriousness of the misconduct, but not the mitigating effect of the Appellant's PTSD. The fact that Constable Moraru was found to be criminally responsible for his action meant that PTSD should be dismissed as a mitigating factor in the disciplinary hearing; in fact, the trial judge had treated the Appellant's illness as a mitigating factor in sentencing the officer. The Commission decided that the Hearing Officer committed an error in principle by accepting the diagnosis while at the same time rejecting the adverse effects of PTSD.

In turn, by refusing to consider the mitigating effect of PTSD, the Hearing Officer failed to consider the second key penalty element – the potential for rehabilitation. In that regard, the most recent medical reports indicate that Constable Moraru is recovering well from his PTSD. These assessments also suggest that his usefulness as a police officer has not been compromised. In addition, he has an exemplary service record and pleaded guilty to the disciplinary charge. Both of these mitigating factors, said the Commission, were not considered by the Hearing Officer.

Finally, with regard to the third element - reputation of the service – the Commission found that the Ottawa Police Service should be aware of how it treats employees with mental illness, and should be cautious about dismissing an individual who contracts a mental illness during his/her employment.

The penalty of dismissal or resignation within seven days was varied to demotion to third class constable for a period of one year, after which Constable Moraru would be eligible for promotion to second class constable, followed by eligibility for first class constable one year later. Reinstatement was made conditional upon mandatory, monitored counselling.

CONSTABLE DAVID MOORE
Appellant

AND

ONTARIO PROVINCIAL POLICE
Respondent

Presiding Members:
Murray Chitra, Chair
Roy Conacher, Member
Hyacinthe Miller, Member

Appearances:
William R. MacKenzie, for the Appellant
Amy Leaman, for the Respondent

Heard:
February 28, 2008

Date of Decision:
May 2, 2008

Summary of Reasons for Decision

Constable David Moore, a member of the Ontario Provincial Police (OPP) for more than 12 years, appealed his conviction on one count of neglect of duty, contrary to section 2(1)(c)(i) of the Code of Conduct under the *Police Services Act*. The officer did not contest the penalty – a reprimand - imposed by the Hearing Officer.

On July 1, 2005, Constable Moore was operating stationary radar on Highway 11 when he pursued a speeding van. The driver took evasive action and, at one point, forced the officer onto the shoulder of the highway. Constable Moore contacted the Communications Centre and was told to discontinue the pursuit. He was also advised that the van was stolen. Another officer who took up the chase was also directed to abandon the pursuit when it became too dangerous. Both officers, however, continued to follow the van from a distance, eventually catching up with the vehicle when it stopped on the shoulder. The driver suddenly reversed into Constable Moore's cruiser, causing damage to it.

The driver and his pregnant girlfriend were arrested at gunpoint. The driver admitted that he had stolen the van and some gasoline. Several officers from various jurisdictions arrived on the scene. Since he was the only officer from the North Bay Detachment and had originated the pursuit in his jurisdiction, Constable Moore took charge of the investigation.

The driver was found to be in possession of a wallet containing almost $800.00 in cash. Constable Moore asked other officers to search the van which yielded coolers, gym bags and knapsacks. They were not opened or searched, nor was the rear of the van.

At the North Bay Detachment, Constable Moore agreed to the driver's request that most of the cash be given to his girlfriend for her trip home. The girlfriend was released and was driven to the bus station, taking the gym bags and knapsacks with her.

The next day Constable Moore contacted the owner of the van, who advised that his wallet and $3,000.00 in cash had been in the vehicle when it was stolen, and that it had been filled with furniture. The following day, the stolen wallet was recovered from the garbage at the North Bay Bus Terminal.

A complaint was lodged against Constable Moore and the other officers who had been on the scene in connection with the investigation. Constable Moore was charged with neglect of duty for allegedly failing to investigate and properly itemize the property recovered, and for releasing property to suspects.

Constable Moore pleaded not guilty to the charge. The Hearing Officer, however, concluded that "much more ought to have been done" and that Constable Moore was negligent in failing to properly investigate the property inside the van.

Counsel for Constable Moore argued that the Hearing Officer erred in law by finding Constable Moore guilty of neglect of duty. Counsel submitted that the officer's actions amounted to no more than a mistake or a poor effort, and that the element of wilfulness or recklessness - necessary to a finding of neglect of duty - was absent in this case. Counsel also submitted that the Hearing Officer erred in not finding that the failings of the other officers mitigated the Appellant's shortcomings. Counsel for the Respondent argued that the Hearing Officer properly concluded that the Appellant's conduct was neglectful and, as the Officer-in-Charge, he was responsible for ensuring a thorough investigation.

The Commission found that Constable Moore accepted the word of an admitted thief without question, and even gave back $500 of the cash to the driver's girlfriend. The officer took no steps to either determine the origins of the cash or search the backpacks and prepare an inventory of their contents. Although the other officers did not search the van as Constable Moore requested, it was his responsibility to satisfy himself that appropriate investigative steps were taken.

The officer's failure to do so was not reasonable or prudent, said the Commission. Constable Moore assumed that a proper search had been done, but he was not entitled to delegate responsibility for his investigative failures. The Commission concluded that the inadequacies of Constable Moore's investigation and his conduct during it went beyond a mere mistake.

The Hearing Officer's decision that the Appellant neglected his duties was based on strong evidence and contained no manifest errors. The Commission, therefore, did not interfere with the findings of the Hearing Officer and dismissed the appeal.

CONSTABLE JAMES VAUGHAN-EVANS
Appellant

AND

TORONTO POLICE SERVICE
Respondent

Presiding Members:
Murray W. Chitra, Chair
Hyacinthe Miller, Member
Garth Goodhew, Member

Appearances:
Andrew McKay, for the Appellant
Darragh Meagher, for the Respondent

Heard:
April 2, 2008

Date of Decision:
July 15, 2008

Summary of Reasons for Decision

Constable James Vaughan-Evans of the Toronto Police Service pleaded guilty to one count of discreditable conduct, contrary to section 2(1) (a) (ix) of the Code of Conduct, under the *Police Services Act*. He appealed the penalty imposed by the Hearing Officer - resign from the police service within seven days or face dismissal.

The Commission heard that Constable Vaughan-Evans had been a regular marijuana user between the ages of 12 and 18. At 19, he joined the police service.

In June of 1992, he began working in the Youth Bureau. The following year, he was exposed to traumatic events during the course of his work, leading to emotional distress and a subsequent diagnosis of Post Traumatic Stress Disorder (PTSD). To alleviate the symptoms of his disorder, Constable Vaughan-Evans began using marijuana heavily in the spring of 1994. He stole eight pay cheques from fellow officers in order to pay for his habit. In 1995, the officer was charged criminally, pleaded guilty and received a conditional discharge with 12 months probation. As a result of his conviction, he was charged with the disciplinary offence of discreditable conduct. He pleaded guilty; a penalty of resignation or dismissal was imposed. However, on appeal to the Toronto Police Services Board, he was reinstated with a demotion and with conditions including a commitment to maintain a drug-free lifestyle.

Constable Vaughan-Evans was reassigned to office work, rather than patrol and night duties, and attended some treatment programs.

The officer, however, stopped attending Alcoholics and Narcotics Anonymous and, in 2002, began playing guitar in two bars. He also started using marijuana heavily once again.

In December 2003, Constable Vaughan-Evans was caught at work smelling of marijuana, and a 'roach' was found on a washroom floor. He admitted the 'roach' was his, but denied having smoked the joint in the washroom. He was suspended with pay. Six months later, while still under suspension and while on his way to sign in at police headquarters, the officer was observed in his car at a subway station, rolling a joint. He was arrested and charged with possession of marijuana.

In September 2005, Constable Vaughan-Evans pleaded guilty to this second criminal charge. He received a second conviction and a second conditional discharge, this time with probation for two years. The second conviction, in turn, led to a second charge of discreditable conduct. Again, he pleaded guilty to the disciplinary charge and, as with the earlier conviction, the Hearing Officer imposed the penalty of dismissal or resignation.

The psychologist, with whom the Appellant had been consulting, testified at the disciplinary hearing. He described Constable Vaughan-Evans' PTSD, anxiety and depression, as well as the course of treatment. He offered the opinion that the officer had ceased using illegal drugs upon his arrest in 2004, but admitted that this opinion could not be confirmed independently.

The Hearing Officer found that the Appellant exhibited a pattern of behaviour characterized by heavy illegal drug use and related criminal activity. Constable Vaughan-Evans had not succeeded in refraining from using marijuana, and had deceived physicians, caregivers, his fellow officers, his supervisors and his wife. The Hearing Officer also found that he had damaged the reputation of the Toronto Police Service and had exhausted his usefulness as a police officer.

Counsel for Constable Vaughan-Evans argued that the officer had a disability - addiction to marijuana - and that the service had a duty to accommodate him. In Counsel's view, the Hearing Officer gave insufficient attention to the duty to accommodate the officer's condition. In particular, the Hearing Officer erred by: (i) failing to equate illegal drugs with alcohol/prescription drug abuse in characterizing the disability of substance abuse; (ii) failing to recognize that the duty to accommodate extends beyond administrative support; (iii) failing to give proper consideration to the Appellant's employment history; and, (iv) failing to acknowledge the evidence of rehabilitation. Counsel requested reinstatement with random drug testing or, alternatively, demotion.

Counsel for the Toronto Police Service argued that the Hearing Officer properly concluded that the Appellant could no longer serve. The officer chose not to stop using marijuana and sought assistance only after he was arrested. Counsel argued that the Commission's approach to a Hearing Officer's decision should be deferential. In this case, there were no manifest errors or other grounds for interfering with a reasonable decision.

As the Hearing Officer concluded, the Appellant's misconduct was serious and repetitive. Constable Vaughn-Evans' actions in 2003 and 2004 were strikingly similar to his misconduct in 1994 and 1995. The Commission found that the Hearing Officer's conclusions about a pattern of deceit were supported by the record. As for the alleged undervaluing of the officer's employment history, the Commission noted that the quality of his police work might have been good, but his employment history was chequered by lengthy suspensions, two criminal convictions, two periods of probation, a significant demotion and three years of drug use monitoring.

Marijuana is an illegal substance, so addiction to marijuana is obviously not synonymous with addiction to alcohol. The Commission, therefore, found that the Hearing Officer did not err by distinguishing the two.

The duty to accommodate must be assessed on an individual, case-by-case basis in light of the requirements of the employee and the employer. The duty is a shared responsibility, in that employees are under a corresponding duty to facilitate reasonable accommodation efforts. In hybrid cases such as this one involving a mixture of culpable and non-culpable elements, assessing the duty to accommodate the officer could be particularly challenging. Notwithstanding that challenge, the Commission said the Hearing Officer properly weighed the service's accommodation efforts against Constable Vaughan-Evans' repeated criminal misconduct.

The Hearing Officer acknowledged that the service had an obligation to accommodate employees with addiction-related disabilities. However, he found that the Service had done all it could in dealing with Constable Vaughan-Evans' condition. In particular, the Hearing Officer rejected the assertion that the Service had offered mere administrative support, and he recounted, at some length, the steps taken to accommodate the Appellant after his addiction was first revealed in 1995. These steps included reassignment, modified hours, non-enforcement duties and drug monitoring. In addition, the Hearing Officer noted that the Appellant failed to take full advantage of the services and treatments offered, and failed to make a concerted effort to overcome an addiction which led him to engage in persistent criminal behaviour. The Commission found that these conclusions were supported on the record.

The Hearing Officer treated Constable Vaughan-Evans' assertion of rehabilitation with scepticism, noting that there was no independent corroboration. In light of the Appellant's history of marijuana use and his related deceptions, it was not unreasonable for the Hearing Officer to have reservations about the self-declared rehabilitation.

It was self-evident that being involved in illegal drugs was unacceptable, antithetical to a police officer's sworn duties and, if known to the public, discrediting to the police service. The Commission concluded that the Appellant knowingly and repeatedly broke the law and breached his sworn duties. The Hearing Officer's conclusions about the damage that would result if the Appellant remained on the force and his marijuana use became public knowledge were supported by the evidence. Although the penalty was severe, it did not reflect any manifest error; instead, the Commission found it reasonable and just. The appeal of the penalty was dismissed.

CONSTABLE CHRIS MAGUIRE
Appellant

AND

PETERBOROUGH-LAKEFIELD COMMUNITY POLICE SERVICE
Respondent

Presiding Members:
Murray W. Chitra, Chair
Garth Goodhew, Member

Appearances:
David Butt, for the Appellant
Glenn P. Christie, for the Respondent

Heard:
June 17, 2008

Date of Decision:
July 28, 2008

Summary of Reasons for Decision

Constable Chris Maguire of the Peterborough-Lakefield Community Police Service was found guilty of one count of neglect of duty, contrary to section 2(1)(c)(ii) of the Code of Conduct under the *Police Services Act*. Specifically, Constable Maguire was found to have breached service order LE-005, s. 4.4, which requires officers to complete and submit an arrest report prior to the fingerprint date and court date. The Hearing Officer imposed a penalty of a loss of five days. The officer appealed that penalty.

On August 1, 2006, Constable Maguire arrested a woman on an outstanding warrant issued when she was a young offender. He was mistakenly advised by a superior officer that the woman should be returned to Adult Court rather than Youth Court. Constable Maguire released the woman and told her to attend for fingerprinting on August 15, 2006 and to appear in Adult Court on August 24, 2006 to answer the charge against her. She appeared for fingerprinting as scheduled, but attended Adult Court on August 23rd rather than the 24th. After making inquiries, the Court Officer discovered that not only was she due in court the following day, she had been wrongly told to return to the Adult Court. Constable Maguire served her with a new notice for Youth Court with an appearance date of September 18, 2006. Follow-up internal inquiries revealed that Constable Maguire had not completed and submitted the required Crown Brief package for this case. His explanation was that he had simply forgotten.

Constable Maguire was charged with neglect of duty, and found guilty after a disciplinary hearing. The parties then made submissions on sentencing. The Hearing Officer considered the offence in terms of the timely and efficient administration of justice, as well as other factors including Constable Maguire's disciplinary record. The officer had a prior conviction for discreditable conduct in January 2005, resulting in a penalty of four days. In addition, he had received an oral reprimand in September 2005 for being late and for failing to submit a Crown Brief package. In the Hearing Officer's view, the prior reprimand for the same misconduct was the most important aggravating factor. Considering all the circumstances, including specific deterrence and the potential for harm to the service, the Hearing Officer decided that a five-day penalty was appropriate.

Counsel for Constable Maguire argued that the penalty was excessive and disproportionate to the offence, and suggested that a penalty of three to 16 hours was more appropriate. Counsel argued that the penalty of five days reflected manifest errors, especially the Hearing Officer's consideration of the entire disciplinary record, as well as his consideration of the potential for harm as opposed to actual or demonstrated harm. Counsel for the Peterborough-Lakefield Community Police Service argued that the Hearing Officer properly applied principles of progressive discipline and specific deterrence. Counsel submitted that the penalty was appropriate and should not be amended.

The Commission agreed with the Hearing Officer's decision that, although the Appellant's misconduct was not particularly serious, it was, nevertheless, part of an emerging pattern of behaviour that needed to be dealt with in some "constructive fashion". The fact that no real harm resulted on this occasion did not mean that there was no potential for harm to the Service if this pattern of behaviour continued unchecked. Describing the Hearing Officer's observations as reasonable and fair, the Commission decided that the approach reflected the essence of a progressive disciplinary system. The subject offence should not be viewed in isolation from the officer's record and, therefore, it was appropriate to consider Constable McGuire's entire employment and disciplinary history.

The Commission also found that the Hearing Officer's consideration of both specific and general deterrence was appropriate. The prior reprimand had not proven to be an effective deterrent, and the public had an interest in the proper and timely administration of justice. The Commission noted that consistent failure to submit documents on time would undermine that public interest. The Hearing Officer's observations about a pattern of conduct and the potential for significant damage to the reputation of the service if Constable Maguire did not reform his conduct were reasonable and supported by the evidence. Finally, the Commission said the penalty was not inconsistent with those imposed for similar misconduct.

The Commission concluded that the Hearing Officer considered all relevant sentencing principles and applied them in a fair and impartial manner, adding that it was not erroneous to take into account the entire employment record, and the penalty reflected no manifest errors. The appeal of the penalty was dismissed.

CONSTABLE WILLIAM YAKIMISHYN
Appellant

AND

PEEL REGIONAL POLICE SERVICE
Respondent

Presiding Members:
Roy B. Conacher, Member
Hyacinthe Miller, Member

Appearances:
Joanne Mulcahy, for the Appellant
Lynda A. Bordeleau, for the Respondent

Heard:
June 4, 2008

Date of Decision:
July 30, 2008

Summary of Reasons for Decision

Constable William Yakimishyn, a 30-year member of the Peel Regional Police Service with an unblemished employment record, appealed the penalty of a forfeiture of five days or 40 hours imposed by the Hearing Officer following his plea of guilty to a charge of discreditable conduct, contrary to section 2(1)(a)(ix) of the Code of Conduct under the *Police Services Act*.

On June 8, 2006, while off duty and parking his car, Constable Yakimishyn damaged another vehicle. The complainant confronted him, but the officer denied causing the damage and left the scene. The complainant called the police. Later that night, Constable Yakimishyn was charged under section 252 of the *Criminal Code of Canada* with failing to remain at the scene of an accident and, under the *Highway Traffic Act* (HTA), with failing to report an accident. The criminal charge was later abandoned. Constable Yakimishyn pleaded guilty to the HTA charge and paid a fine of $500.00 and $200.00 in restitution to the complainant.

Constable Yakimishyn was subsequently charged with discreditable conduct under the *Police Services Act*. At the beginning of the disciplinary hearing, he pleaded guilty to the charge. Following an adjournment, the parties made a joint submission on a penalty of 20 hours. The Hearing Officer indicated that he was not prepared to accept the proposed penalty since, in his view, it did not adequately reflect certain aggravating factors. He advised the parties that he was considering a penalty of five days and

adjourned the hearing to allow the parties an opportunity to present submissions. The Hearing Officer ultimately rejected the joint submission and explained his reasons for doing so.

Counsel for Constable Yakimishyn argued that the Hearing Officer made a number of errors in rejecting the joint submission; in particular, introducing information which was not contained in the parties' joint submission. In addressing the standard required for justifying departure from a joint submission, Counsel proposed the threshold criteria used in criminal proceedings: joint submissions should not be rejected unless they were unreasonable, contrary to the public interest or would bring the administration of justice into disrepute. Counsel argued that such a standard was appropriate in light of the "institutional bias" of a disciplinary process wherein both the Prosecuting Officer and the Hearing Officer were appointed by the Chief of Police.

Counsel referred to the Hearing Officer's comment that a total of seven officers from the Peel Regional Police had been the subject of fail-to-remain accident investigations, indicating a problem which needed to be addressed through this case. Counsel submitted that this information was not part of either the evidentiary record or the joint statement, and that the Hearing Officer unfairly and erroneously relied on it to escalate the penalty.

Counsel for the Peel Regional Police Service argued that the standard advocated by the Constable Yakimishyn for rejecting a joint submission was not required in order to avoid the prospect of "systemic conflict". The appropriate standard, he noted, had already been articulated by the Commission: fairness and the provision of clear and cogent reasons based on a firm factual foundation and on relevant sentencing factors. Counsel stated that the allegation of improper reliance on ex-record information was misplaced: a Hearing Officer was entitled to draw upon personal experience, knowledge and expertise in making his or her decision. In this case, the Hearing Officer was aware of problems with other officers leaving accident scenes and, according to the officer's Counsel, was entitled to rely on that fact in considering the seriousness of the misconduct and the need for general deterrence.

In rejecting the joint submission, the Commission found that the Hearing Officer failed to provide reasons which were fair, reasonable, clear and cogent. He also relied on information which was not properly before him.

The standard for rejecting a joint submission has previously been established by the Commission. Additional criteria based on those utilized in criminal proceedings were not required or appropriate in the context of disciplinary hearings, which are essentially labour relations proceedings between an employer and an employee. Nor do the functions of the chief, the prosecuting officer and the hearing officer under Part V of the *Police Services Act* justify the adoption of a higher standard. As earlier stated by the Commission in rejecting a joint submission, the Hearing Officer has to act fairly, impartially and on the basis of a solid evidentiary foundation. Clear and cogent reasons for the departure must be provided.

A Hearing Officer, said the Commission, is obliged to give careful consideration to a joint submission, as in this case, where the submission contains a detailed analysis of all the relevant sentencing factors. Although a Hearing Officer could make observations based on common general knowledge or specialized understanding of police practices, he or she is not entitled to stray from the evidence presented. In this case, the Commission found that the Hearing Officer improperly introduced information concerning seven other Peel Regional Police officers without an evidentiary foundation. This information did not fall into the category of common knowledge or personal experience, and consideration of the information led the Hearing Officer to place more weight on the factors of seriousness of the misconduct and general deterrence. Given that the Appellant had no opportunity to respond to this information, the Commission concluded that the process and the result were unfair to Constable Yakimishyn.

The Hearing Officer provided no clear and cogent reasons why the joint submission should be rejected on the grounds of public interest and reputation of the police service. This, said the Commission, constituted a manifest error. In addition, the Appellant had a lengthy, unblemished career with the service, yet the Hearing Officer erroneously failed to consider the application of progressive discipline.

The Commission concluded that the penalty imposed by the Hearing Officer was harsh and excessive. By contrast, the negotiated penalty was within the range found in other decisions filed by the parties. Accordingly, the Commission allowed the appeal and varied the penalty of five days to 20 hours as agreed to in the joint submission.

CONSTABLE SCOTT HAMPEL
Appellant

AND

TORONTO POLICE SERVICE
Respondent

Presiding Members:
David Edwards, Member
Hyacinthe Miller, Member

Appearances:
Harry Black, Q.C., for the Appellant
Ian Solomon, for the Respondent

Heard:
July 23, 2008

Date of Decision:
August 14, 2008

Summary of Reasons for Decision

Constable Scott Hampel, a member of the Toronto Police Service since 1987, appealed his conviction on one count of insubordination, contrary to section 2(1) (b) (ii) of the Code of Conduct under the *Police Services Act*. He also appealed the penalty imposed: forfeiture of seven days or 56 hours pay.

Constable Hampel was charged with violating service Rule 4.13.1: "All computer and telecommunications equipment owned, leased, loaned or rented by the Service shall be used exclusively for police business." Constable Hampel admitted conducting CPIC searches, but claimed that he did so for the purpose of police business.

Constable Hampel testified that T, his former wife and a Toronto police officer, had been conducting improper searches on his current wife, N, in order to learn where they lived. An informal disciplinary record against T was entered into evidence at the disciplinary hearing, establishing a history of T using CPIC to check on Constable Hampel, his then-girlfriend and his uncle. Constable Hampel testified about an incident in which T appeared at N's residence in uniform and carrying a firearm, which N perceived as threatening. There was also an incident involving a graphic and disturbing bogus 9-1-1 call to their former residence. Constable Hampel believed that T was behind the call. He also testified about a suspicious inquiry to Internal Affairs requesting an update of his address.

Both Constable Hampel and his wife began to fear for their personal safety. Therefore, at the request of his wife, Constable Hampel conducted CPIC searches in an effort to determine whether T had been carrying out unauthorized checks on her.

Counsel for Constable Hampel argued that the Hearing Officer erred in finding that the officer's defence was based on securing his wife's peace of mind; rather, counsel proposed that the Hearing Office should have considered that the checks were done for police business and, therefore, were lawful. Counsel argued that the Hearing Officer ignored evidence; in particular, Constable Hampel's stated intention to report any CPIC violations found through his searches. Also, counsel asserted that the Hearing Officer erred in law with respect to the penalty he imposed by taking into account stale-dated discipline. In counsel's view, the penalty was excessive having regard to the circumstances as well as Constable Hampel's prior work record and comparator cases.

Counsel for the Toronto Police Service pointed out that the Constable Hampel admitted that he was subject to a lawful order, Rule 4.13.1, had conducted the CPIC searches and disclosed the results to a third party, his wife, thereby proving the necessary elements of the offence of insubordination. Counsel noted that the Hearing Officer identified certain "complicating factors": (i) the unauthorized use occurred on two separate occasions; (ii) this was Constable Hampel's second discipline for misuse of service technology; and, (iii) the officer's failure to appreciate that CPIC use for personal purposes was totally prohibited. Having regard to these factors, as well as the seriousness of the misconduct and the need for both general and specific deterrence, counsel submitted that the penalty was appropriate.

The Commission found that a clear conflict of interest arises whenever a police officer pursues, in his or her capacity as a police officer, any matter in which there is a personal interest.

The Hearing Officer, as noted by the Commission, concluded that Constable Hampel had used the CPIC system to determine whether T had been conducting improper inquiries. His actions were found to have been motivated by his wife's fear that T might have located their address. However, the Commission found that the reasonableness of N's fear was irrelevant to the issue of guilt. Rather, the evidence supported the Hearing Officer's conclusion that Constable Hampel had violated the direction that police equipment be used exclusively for police business. The fact that he shared the confidential results of his searches with his wife only aggravated the misconduct. Accordingly, the Commission dismissed the appeal against the conviction for insubordination.

With respect to penalty, the Commission found that the Hearing Officer erred by taking into account two prior informal disciplinary documentations on Constable Hampel's record. Section 64(16) of the *Police Services Act* provides for a two-year sunset clause with respect to disciplinary entries; that is, entries are to be removed after two years if there are no further entries. The statutory time clock ran from the date when

the complaint or allegation was proved on clear and convincing evidence; in other words, the date when the Hearing Officer found Constable Hampel guilty of insubordination. Since the prior discipline was beyond the two-year limit, it is deemed to be expunged and should not have factored into the penalty decision in this matter. In light of this error, the Commission concluded that it was appropriate to revoke the penalty of seven days or 56 hours and replace it with a forfeiture of three days or 24 hours.

DUANE SIMON
Appellant

AND

CONSTABLE DAWN LAURYSSEN AND PEEL REGIONAL POLICE SERVICE
Respondents

Presiding Members:
Roy R. Conacher, Member
Garth Goodhew, Member

Appearances:
Duane Simon, Appellant
William R. MacKenzie, for Constable Lauryssen
Lynda A. Bordeleau, for Peel Regional Police Service

Heard:
July 25, 2008

Date of Decision:
October 3, 2008

Summary of Reasons for Decision

Duane Simon, an off-duty member of the Toronto Police Service, appealed the decision of the Hearing Officer who found Constable Dawn Lauryssen, a Peel Regional Police officer, not guilty of one charge of discreditable conduct, contrary to section 2(1)(a)(xi) of the Code of Conduct under the *Police Services Act*.

Mr. Simon reported to the Peel Regional Police Service that he had been subjected to harassing phone calls by a former female acquaintance, TG. Constable Lauryssen was directed by Sergeant Dale Waller to investigate Mr. Simon's allegation. On May 25, 2004, Constable Lauryssen asked Mr. Simon to attend 22 Division. When Mr. Simon arrived, he was placed in an interview room and given a witness statement form to complete. Constable Lauryssen locked the interview room door. While police service directives specify that interview rooms are to be locked when detainees are left alone, they do not include witnesses and victims.

On the same date, Sergeant Waller and Detective Heyes were investigating a complaint filed earlier that morning by TG against Mr. Simon, alleging that he had assaulted her. About 30 minutes after Mr. Simon had been placed in the interview room, Sergeant Waller and Detective Heyes returned to 22 Division. When they were told that Mr. Simon was in an interview room, they began to question him with regard

to the complaint they had taken from TG. At the end of the interview, the officers charged Mr. Simon with assault.

Ten months later, Mr. Simon filed a complaint against the officers involved in the investigation of his complaint and the officers involved in the investigation of TG's allegation of assault. With respect to Constable Lauryssen, Mr. Simon alleged that, by locking the interview room, she had unlawfully detained him for approximately 30 minutes and, further, that she colluded with Sergeant Waller and Detective Heyes in their investigation of the assault complaint against him. Mr. Simon also alleged that Constable Lauryssen violated his *Charter* rights by failing to advise him that he was a suspect in the assault before he provided his witness statement.

Mr. Simon's complaint was investigated and found to be unsubstantiated. He appealed that decision to the Commission, who directed that a hearing be held. Constable Lauryssen was charged with one count of discreditable conduct. The allegation was that, in locking Mr. Simon in the room, she had unlawfully detained him and had acted in a disorderly or prejudicial manner.

Constable Lauryssen pleaded not guilty. Mr. Simon testified that he was not told the door would be locked; when he attempted to leave by knocking on the door, his knocks went unanswered. Also, Mr. Simon said he was not cautioned prior to providing his statement. Constable Lauryssen testified that she was simply following Sergeant Waller's order to investigate Mr. Simon's complaint. She stated that she was not aware of the parallel investigation into the assault complaint against Mr. Simon until much later that day. In the interests of safety and security, it was her practice to lock the door of the interview room. She claimed she told Mr. Simon that she was locking the door and to knock when he was finished or if he required assistance. Constable Lauryssen further claimed that Mr. Simon never indicated he wanted to leave the interview room.

The Hearing Officer was not satisfied that there was clear and convincing evidence of discreditable conduct. He dismissed the charge against Constable Lauryssen.

During his appeal of that decision, Mr. Simon brought a preliminary motion requesting that the Commission direct a new hearing before a different hearing officer from a different police service. He alleged that the Hearing Officer, who came from the same service as the officer charged, was in a direct conflict of interest and, therefore, raised a reasonable apprehension of bias. Counsel for the Respondents - Constable Lauryssen and the Peel Regional Police Service - opposed the motion on the grounds of jurisdiction and surprise, the latter ground relating to the allegation of bias raised at the appeal hearing without any prior notice. On the merits, Mr. Simon argued that the Hearing Officer ignored evidence suggesting that Constable Lauryssen knew of the second investigation, was not objective in his analysis and erred in making findings of credibility. The Respondents argued that the Hearing Officer correctly applied the test for discreditable conduct and that his decision, as a whole, was reasonable and

supported by the evidence. Mr. Simon, they maintained, was not detained, as there was no element of coercion.

With respect to the preliminary motion, the Commission noted that the allegation of bias was raised for the first time at the appeal hearing. The Commission's powers are clearly set out in section 70(6) of the *Police Services Act*. The enumerated powers do not implicitly include the power to order a new hearing before another hearing officer. The Commission's Rules of Practice require appellants to set forth all grounds of appeal in the Notice of Appeal. In this matter, the Commission found that Mr. Simon failed to comply with Rule 8.2(b) by not including the allegation of bias. Furthermore, by continuing to participate, a party may be taken to have acquiesced in the process. This gives rise to an implied waiver of objection. Finally, the presumption of adjudicative impartiality had not been rebutted by any clear evidence of bias or predisposition. The fact that the Hearing Officer and Constable Lauryssen were part of the same police service, noted the Commission, did not raise a reasonable apprehension of bias. The Commission found that Mr. Simon's allegations were speculative and not factually based. The motion was denied.

With respect to the charge of discreditable conduct, the Commission stated that the Hearing Officer correctly identified the central issues: whether Mr. Simon was detained and, if so, whether the detention was unlawful. The Hearing Officer concluded that the evidence did not support the allegation. He was not satisfied on clear and convincing evidence that Constable Lauryssen knew Mr. Simon was a suspect when he arrived at 22 Division. The Hearing Officer rejected Mr. Simon's version of events, and found Constable Lauryssen's version credible. He found that as an experienced police officer Mr. Simon knew that obtaining a witness statement was a sound investigative technique. Mr. Simon did not attempt to leave the room, and his evidence was inconsistent with a subjective belief that he had been improperly deprived of his liberty; moreover, there was nothing requiring his apprehension at that time. Finally, the Hearing Officer found that locking the door was a reasonable practice in a police station and would be viewed by the community as a reasonable measure. The Commission agreed with the Hearing Officer that Constable Lauryssen's action of locking the door did not constitute discreditable conduct.

Findings of credibility and fact are within a hearing officer's jurisdiction and should not be disturbed unless flawed by manifest error. The Commission concluded that there were no manifest errors in the Hearing Officer's analysis of the evidence, his findings of fact and credibility, or his application of the standard of proof and relevant law. As for the detention aspect, the Commission found that factual findings supported the conclusion that Mr. Simon did not complain about being detained at the time or for a considerable time thereafter. The necessary element of compulsion, as a result, was absent. The appeal was dismissed.

CONSTABLE RYAN VENABLES
Appellant

AND

YORK REGIONAL POLICE SERVICE
Respondent

Presiding Members:
Murray Chitra, Chair
Garth Goodhew, Member
Tammy Landau, Member

Appearances:
William R. MacKenzie, for the Appellant
Jason D. Fraser, for the Respondent

Heard:
May 20, 2008

Date of Decision:
October 3, 2008

Summary of Reasons for Decision

Constable Ryan Venables, a York Regional Police officer with less than three years experience, appealed the penalty imposed by the Hearing Officer - dismissal failing resignation within seven days - after pleading guilty to three counts of misconduct: one count of discreditable conduct, contrary to section 2(1)(a)(i) of the Code of Conduct, a second count of discreditable conduct, contrary to section 2(1)(a)(ix) and one count of unlawful or unnecessary exercise of authority, contrary to section 2(1)(g)(ii) of the Code under the *Police Services Act*.

On November 11, 2006, Constable McNamee, assisted by Constable Patridge, arrested a suspected drunk driver VB in the City of Vaughan. They charged him with refusing to provide a roadside breath sample. VB was handcuffed and placed in the back of Constable McNamee's cruiser. Constables DeWinne and Venables arrived on the scene as the paperwork was being completed. Constable Venables approached the cruiser and asked VB if he was Russian. The prisoner replied that he was. Constable Venables then called VB a "fucking drunk Russian" and punched the prisoner on the side of his head. When Constable Venables returned to his own cruiser, he remarked to Constable DeWinne: "I hate Russians."

The prisoner sustained injuries in the form of a chipped tooth, and a cut and swollen lip. VB told Constable McNamee what occurred and, before the end of his shift, Constable Venables was suspended from duty with pay. The next month he was

charged under the *Criminal Code of Canada* with assault causing bodily harm. On May 2, 2007 the officer pleaded guilty in criminal court and received a suspended sentence and 18 months probation subject to terms.

At his subsequent disciplinary hearing, Constable Venables pleaded guilty to two charges of discreditable conduct and one charge of unlawful or unnecessary exercise of authority. An agreed statement of facts acknowledging wrongdoing was submitted along with character evidence. Constable Venables stated: (i) he was frustrated from a previous call that evening; (ii) he never intended to punch the prisoner; (iii) he didn't recall making the ethnic comments, but was embarrassed that he had; (iv) his conduct was out of character; (v) following the incident, he attended anger management courses; and, (vi) had registered for a course on racial sensitivity.

The Hearing Officer acknowledged the mitigating factors including Constable Venables' guilty plea, an essentially clear employment record, his apology to the victim and a sincere expression of remorse. However, in the view of the Hearing Officer, these factors were outweighed by the serious "reprehensible" nature of the misconduct and the damage to the reputation of the York Regional Police Service.

Counsel for Constable Venables argued that the Hearing Officer erred in principle by disregarding positive character evidence and rehabilitative potential, and failing to apply principles of progressive discipline. Counsel for the police service argued that the Hearing Officer properly identified all sentencing factors and was entitled to conclude that the misconduct was so reprehensible that Constable Venables was no longer useful to the service.

The Commission noted the Hearing Officer's description of the officer's conduct as "egregious". The offensiveness of an unprovoked assault on an unresisting, handcuffed prisoner was self-evident. The Commission concurred that the conduct was aggravated by two factors: the clear discriminatory overtones and the criminal conviction that resulted.

The Hearing Officer identified several mitigating factors, including a good prior employment record. Nevertheless, Constable Venables was a very junior officer, having been in uniform only 31 months at the time of the incident. Therefore, the mitigating value of his employment record was limited by its brevity.

With regard to the officer's future usefulness, the Hearing Officer observed that the assault had damaged the reputation of the service, jeopardized public trust and raised serious issues of police accountability and integrity, especially given the overtones of racial intolerance, which could undermine community outreach initiatives in the multicultural population served by the York Regional Police. The Hearing Officer concluded that Constable Venables' rehabilitative potential was outweighed by the seriousness of his misconduct and the potential damage to the reputation of the police service if he were to remain on the job.

Concluding that Constable Venables' conduct violated fundamental principles of policing as set out in the first section of the *Act,* the Commission dismissed the officer's appeal, saying that it was open to the Hearing Officer to conclude that the Appellant's egregious misconduct presented insurmountable obstacles to his suitability as a police officer given the disturbing facts of this case.

CONSTABLE J.J. DEVINE
Appellant

AND

ONTARIO PROVINCIAL POLICE
Respondent

Presiding Members:
Garth Goodhew, Member
David Edwards, Member

Appearances:
Gavin J. May, for the Appellant
Natalie Osadchy, for the Respondent

Heard:
November 18, 2008

Date of Decision: November 26, 2008

Summary of Reasons for Decision

Constable J.J. Devine, a third-class constable with the Ontario Provincial Police (OPP), pleaded guilty to one count of discreditable conduct, contrary to section 2(1)(a)(xi) of the Code of Conduct under the *Police Services Act*. The Hearing Officer imposed a penalty of demotion from second-class constable to third-class constable for a period of two years. Constable Devine appealed that penalty.

While off-duty and while driving his own truck, Constable Devine hit a patch of black ice, slid off the road and into a ditch. He suffered a cut to his head. A passerby drove him to the Uxbridge Cottage Hospital for treatment. Constable Devine called an acquaintance for a ride back to the scene of the accident. The acquaintance subsequently called police on Constable Devine's behalf.

The attending officer detected an odour of alcohol on Constable Devine's breath and other signs of impairment. Constable Devine voluntarily provided a breath sample, which he failed. He was charged under the *Highway Traffic Act* and later convicted of Leave Roadway Not in Safety. He was fined $110.

The amended Notice of Hearing alleged only that Constable Devine operated a motor vehicle after having consumed alcohol and failed a roadside breath test. Prior to amendment, the original notice contained two other allegations: (i) that Constable Devine failed to notify police in a proper and timely manner; and, (ii) that he had been

involved in another collision in the Whitby area and left the scene without notifying police. These two additional allegations were removed from the Notice of Hearing upon consent of the Prosecutor and Defence Counsel.

Constable Devine pleaded guilty to the amended charge at the disciplinary hearing where the parties submitted an agreed statement of facts. The Prosecutor specifically stated that he was not relying on the first of the additional charges – delay in notifying police of the accident. However, the Hearing Officer expressed the opinion that the officer "...ensured that he was outside the required timelines prior to calling police to avoid the criminal charge. These evasive actions are a significant aggravating factor." The Hearing Officer then imposed a two-year demotion.

Counsel for Constable Devine argued that the Hearing Officer erred in treating deliberate delay as an aggravating factor. Counsel argued that this was a departure from the agreed statement of facts and, therefore, a breach of natural justice. Further, Counsel argued that a two-year demotion was at the extreme high end of the range of penalties for drinking and driving. The penalty, said the Counsel, was excessive and did not reflect mitigating factors, such as the officer's guilty plea. Instead, Counsel proposed a six-month demotion as an appropriate penalty.

Counsel for the OPP argued that the Hearing Officer properly considered all relevant sentencing factors and made no manifest errors. Counsel maintained that the officer's appeal should be dismissed.

Constable Devine pleaded guilty to the amended charge despite the fact that the Hearing Officer believed that he deliberately delayed calling police in order to avoid a criminal charge. The Commission found that this allegation was a departure from the agreed statement of facts and a departure from the grounds as stated by the prosecutor at the hearing. Constable Devine had no notice of this additional charge or allegation and, therefore, had no opportunity to defend himself against it. Once that charge was deleted, it was a breach of natural justice for the Hearing Officer to consider it without notice to the parties.

In addition, no reason for the delay in notifying police was included in the agreed statement of facts. By reaching his own conclusion as to the reason for the delay, the Hearing Officer had, effectively, imported fresh evidence into the agreed statement of facts.

Therefore, the Commission decided that it was a manifest error for the Hearing Officer to find deliberate delay in notifying the police and to treat the delay as an aggravating factor.

Drinking and driving is a serious offence. Nevertheless, concluded the Commission, there were mitigating factors in this case: a guilty plea; positive performance evaluations; letters of support from co-workers and supervisors; and, minimal damage resulting from the accident.

In light of the manifest error, the seriousness of the misconduct and the mitigating factors, the Commission allowed the appeal and varied the penalty to a one-year demotion from second-class constable to third-class constable.

CONSTABLE WENDY GARDNER
Appellant

AND

ONTARIO PROVINCIAL POLICE
Respondent

Presiding Members:
David Edwards, Member
Hyacinthe Miller, Member

Appearances:
Theresa R. Simone, for the Appellant
Crystal O'Donnell, for the Respondent

Heard:
November 21, 2008

Date of Decision:
December 12, 2008

Summary of Reasons for Decision

Constable Wendy Gardner of the Ontario Provincial Police appealed her conviction on one count of discreditable conduct, contrary to section 2(1)(a)(xi) of the Code of Conduct under the *Police Services Act*, as well as the penalty of the forfeiture of 40 hours.

The disciplinary charge arose from an on-duty incident in which Constable Gardner and other officers were assigned to traffic control. There was conflicting evidence about whether the incident occurred on September 21, 2005 (the officer's testimony) or September 22, 2005 (the complainant's testimony). There were further inconsistencies about details surrounding the incident. In essence, the complainant alleged that Constable Gardner approached and grabbed him by the genitalia in full view of the public. Constable Gardner admitted touching the complainant, but claimed this was accidental. Contact was admitted, but intention was not. The incident was witnessed by another officer.

Prior to the scheduled appeal hearing date, the parties filed a joint motion requesting the Commission to revoke both the conduct and penalty decisions of the Hearing Officer on the basis of evidence which came to their attention after the hearing and sentencing. In particular, the complainant testified at the hearing that he had no other handwritten notes about the incident. However, during the process of bringing a civil action against Constable Gardner, he produced a diary, which he claimed to have

authored contemporaneously. The existence of the diary called into question the complainant's credibility.

In a preliminary decision (OCCPS #08-09), the Commission ruled that: (i) it had a duty to determine whether the request made by the parties was reasonable; and, (ii) this determination could not be made in the absence of any supporting material. The Commission also asked for submissions as to its jurisdiction to hear the motion.

Based on supporting material subsequently filed by the parties, the Commission denied the motion to revoke the penalty and reach decisions without a hearing. Section 70(2) of the *Police Services Act* (Act) imposes a positive obligation upon the Commission to hold a hearing where a police officer appeals a Hearing Officer's decision. The critical element of a hearing is the Commission's consideration of the entire record; any procedure which abbreviates that process was not appropriate. Furthermore, while the motion to revoke the conduct and penalty decisions raises doubts about the complainant's credibility, the Hearing Officer did not rely solely on the complainant's testimony in reaching his decision. Finally, the Commission does not have authority to order a re-hearing. Revoking a decision without dismissing the charge raises the possibility that the charge might remain outstanding. The fact that the revocation motion was brought on consent does not relieve the Commission of its responsibility to abide by the Act in exercising its powers.

Counsel for Constable Gardner brought a subsequent motion to admit fresh evidence consisting of, among other things, the complainant's diary and police notebook. With the exception of some e-mail chains, the new evidence satisfied the legal test for the admission of fresh evidence.

Counsel for the officer took the position that the Hearing Officer ignored fundamental evidence; in particular, inconsistancies in testimony between Constable Gardner and the complainant. In addition, the new evidence showed further inconsistencies between the complainant's testimony at the hearing and his subsequent position in the civil suit; that is, he failed to disclose key evidence (his diary) and claimed that there was no such evidence available for the disciplinary hearing. The complainant also testified at the hearing that he had no issues with Constable Gardner before or after the incident, but in his civil suit he claimed that she sexually harassed him before and after the incident. Finally, counsel for Constable Gardner submitted that the penalty was excessive.

Counsel for the Ontario Provincial Police argued that the Hearing Officer's decisions should be revoked, but the charge should not be dismissed. Counsel argued that the fresh evidence did not contradict the core issue that the incident occurred in the manner asserted by the complainant. The complainant's version was supported by an officer who witnessed the incident, who said that the touching was not accidental.

The Commission found that the Hearing Officer clearly misapprehended significant aspects of the testimony. For example, the Hearing Officer concluded that the conflict about the date of the incident did not matter. That conclusion was erroneous; in fact, the date was of major significance as it related to the essential matter of the credibility of witnesses and the reliability of their testimony about events. The Hearing Officer did not demonstrate that he considered the obvious inconsistencies or that he gave them sufficient weight. The Commission concluded that the Hearing Officer reached key conclusions that were unfounded.

In addition, the Commission determined that the fresh evidence cast serious doubt upon the complainant's credibility and undermined several factual findings. For example, contrary to the complainant's position in his civil suit, the Hearing Officer described Constable Gardner and the complainant as agreeing that they had a good working relationship with no negative history.

The fresh evidence indicated that the complainant was neither forthright nor honest in some of his testimony under oath. He withheld disclosure of critical evidence to counsel for both sides. His testimony, which the Hearing Officer had preferred, had to be viewed with great scepticism given the discrepancies between his evidence at the hearing and the claims revealed by the new evidence.

In light of this new evidence, the Commission concluded that the standard of proof in disciplinary hearings - clear and convincing evidence - could not be met, and the conviction could not be allowed to stand. The appeal was allowed and the conviction set aside.

Statutory Appeals and Judicial Reviews

The following is a list of Commission decisions that were subject to statutory appeals and judicial reviews and applications decided in 2008. The decisions can be found at: http://www.canlii.org/on/.

PARTIES	COURT	OUTCOME
Ray (OPP) v. Ontario Civilian Commission on Police Services	Divisional Court	Appeal dismissed November 14, 2008
Police Services Board for the City of Kenora v. Ontario Civilian Commission on Police Services	Superior Court of Justice	Application dismissed October 9, 2008
Wolfe (OPP) v. Ontario Civilian Commission on Police Services	Divisional Court	Appeal allowed May 20, 2008
Stone (Toronto) v. Ontario Civilian Commission on Police Services	Divisional Court	Appeal dismissed October 6, 2008
Wilson (OPP) v. Ontario Civilian Commission on Police Services	Divisional Court	Appeal dismissed October 15, 2008
Kus v. Ontario Civilian Commission on Police Services, et al	Divisional Court	Application dismissed June 20, 2008
Hall (Ottawa) v. Ontario Civilian Commission on Police Services	Divisional Court	Appeal dismissed December 10, 2008

Public Complaints

Part V of the Police Services Act mandates the Commission as the review body for public complaint decisions made by chiefs of police and the Commissioner of the Ontario Provincial Police.

Complaints may be made about the conduct of a police officer (including the Chief of Police or Commissioner of the Ontario Provincial Police), the policies of a police service or the services provided by a police service. Only the individual directly affected can file a complaint and the complaint must be in writing and signed.

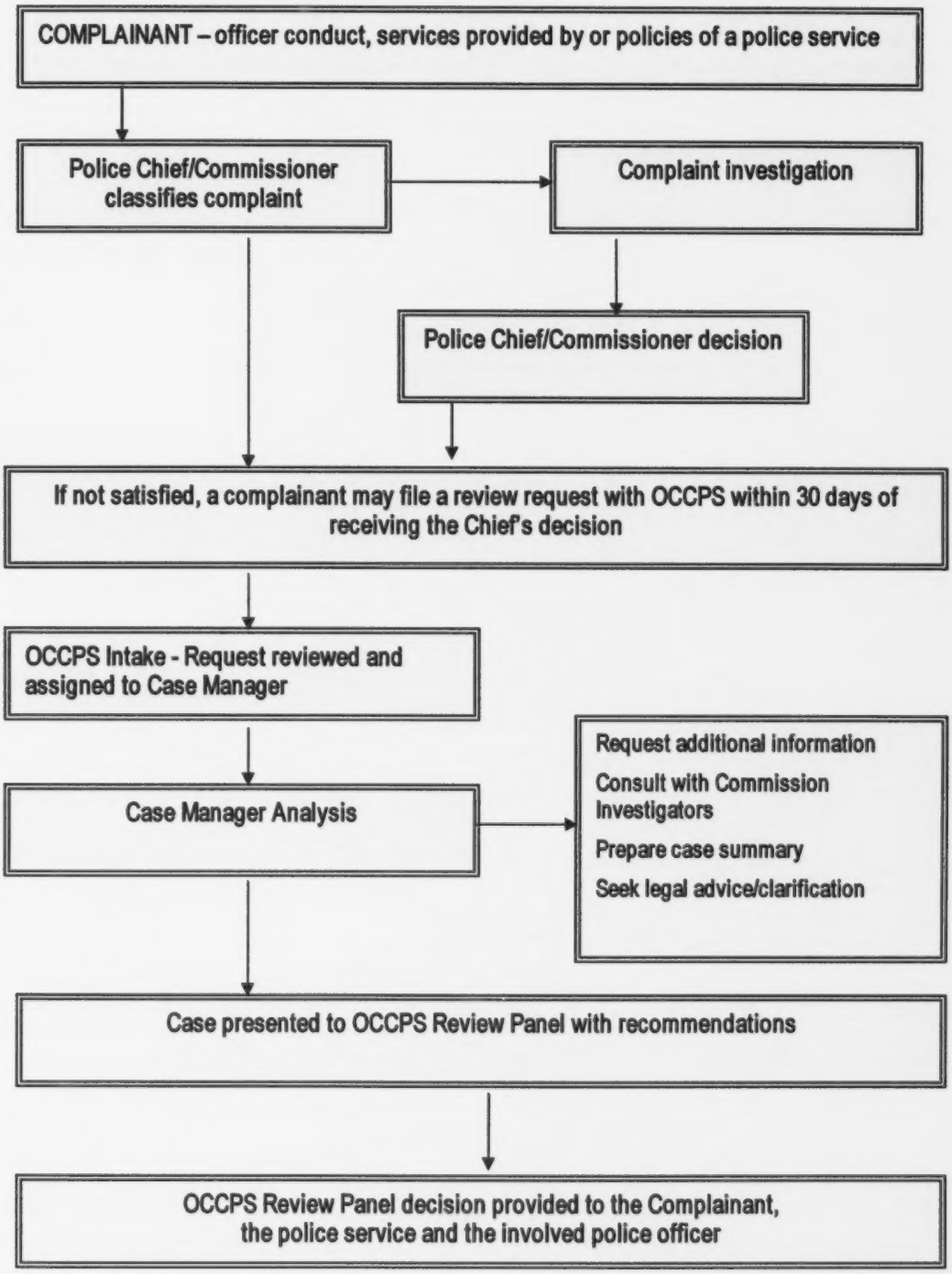
If the individual involved is not satisfied with the decision of the Chief of Police or Commissioner of the Ontario Provincial Police, the complainant has 30 days to write to the Commission and request a review. To conduct the review, the Commission requests information from the complainant as well as the investigation file from the involved police service. Case Managers analyze each file and prepare a written case summary that is presented to a Review Panel composed of Commission members.

On review, the Commission may confirm the decision of the Chief/Commissioner or they may vary the decision to less serious misconduct, direct a public hearing or return the file to the involved police service or another police service for further investigation.

In 2008, there were 2,583 public complaints filed against the 24,450 sworn police officers or their police services in Ontario. This represents a slight decrease in complaints made against the sworn police officers for 2007. During 2008, the Commission received 568 requests for review, an increase of requests from the previous year.

An overview of the complaints review process and a statistical summary of public complaints from 2004 to 2008 are contained on the following pages.

Overview of Public Complaints Process


COMPLAINANT – officer conduct, services provided by or policies of a police service
Police Chief/Commissioner classifies complaint
Complaint investigation
Police Chief/Commissioner decision
If not satisfied, a complainant may file a review request with OCCPS within 30 days of receiving the Chief's decision
OCCPS Intake - Request reviewed and assigned to Case Manager
Case Manager Analysis
Request additional information
Consult with Commission Investigators
Prepare case summary
Seek legal advice/clarification
Case presented to OCCPS Review Panel with recommendations
OCCPS Review Panel decision provided to the Complainant, the police service and the involved police officer

Statistical Charts

The following four charts depict:

- The number of public complaints against police officers in Ontario for the period 2004 - 2008
- 2008 Police Service Complaints Activity
- Reviews requested by complainants for the period 2004 - 2008
- Commission review statistics 2004- 2008

PUBLIC COMPLAINTS AGAINST POLICE OFFICERS IN ONTARIO +
2004 - 2008

2004	**3,110**
2005	**2,868**
2006	**2,613**
2007	**2,623**
2008	**2,583**

+ Source: Police Services Self Reported

2008 Police Services	Total Officers subject to Part V	TOTAL PUBLIC COMPLAINTS 2007	TOTAL PUBLIC COMPLAINTS 2006 (NEW)	TOTAL PUBLIC COMPLAINTS – CONDUCT	TOTAL PUBLIC COMPLAINTS – SERVICE	TOTAL PUBLIC COMPLAINTS – POLICY	PUBLIC COMPLAINTS CARRIED FROM PREVIOUS YR 2006	ALLEGATIONS - Incivility	ALLEGATIONS - Neglect of Duty	ALLEGATIONS - Discreditable Conduct	ALLEGATIONS - Excessive Use of Force	ALLEGATIONS - Exercise of Authority	ALLEGATIONS - Unsatisfactory Work Performance	ALLEGATIONS - Other	NOT DEALT WITH (Section 59)	RESOLUTION - Informal (Conduct)	WITHDRAWN	UNSUBSTANTIATED	INFORMAL DISCIPLINE	HEARING	LOST JURISDICTION	OUTSTANDING INVESTIGATIONS (December 2008)
Amherstburg	31	4	9	15	0	0	0	1	1	7	0	5	1	0	0	1	2	11	0	0	1	0
Aylmer	13	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Barrie	207	40	26	26	0	0	9	4	0	3	10	2	7	0	1	9	7	9	0	0	0	0
Belleville	19	19	14	14	0	0	0	0	1	9	1	3	0	0	0	0	5	2	4	0	0	3
Brantford	155	20	14	14	0	0	4	2	7	3	1	1	0	0	3	3	5	2	1	1	1	2
Brockville	38	5	5	4	0	1	0	0	1	0	2	1	0	0	1	0	0	4	0	0	0	0
Chatham Kent	170	29	28	24	2	2	0	4	7	6	3	0	0	8	4	6	4	10	2	1	0	0
Cobourg	30	0	4	4	0	0	0	0	0	4	0	0	0	0	1	0	0	3	0	0	0	0
Cornwall	96	9	2	2	0	0	1	0	0	0	1	1	0	0	0	0	0	2	0	0	0	1
Deep River	8	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Dryden	20	7	9	9	0	0	1	0	5	4	1	0	0	0	2	0	1	3	2	1	0	1
Durham Regional	957	99	108	100	0	8	0	0	33	49	16	7	0	1	30	0	43	21	0	0	0	12
Espanola	12	3	1	1	0	0	1	1	0	0	1	0	0	0	0	1	0	1	0	0	0	0
Essex	32	5	1	1	0	0	3	0	2	1	0	0	0	1	0	0	2	2	0	0	0	0
Gananoque	15	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Guelph	190	14	23	23	0	0	1	9	6	7	1	0	0	0	3	3	3	5	0	0	0	9
Halton Regional	607	59	55	54	0	1	12	3	7	39	8	0	0	0	3	11	20	27	0	0	0	9

2008 Police Services	Total Officers subject to Part V	TOTAL PUBLIC COMPLAINTS 2007	TOTAL PUBLIC COMPLAINTS 2008 (NEW)	TOTAL PUBLIC COMPLAINTS – CONDUCT	TOTAL PUBLIC COMPLAINTS – SERVICE	TOTAL PUBLIC COMPLAINTS – POLICY	PUBLIC COMPLAINTS CARRIED FROM PREVIOUS YR 2006	ALLEGATIONS - Incivility	ALLEGATIONS - Neglect of Duty	ALLEGATIONS - Discreditable Conduct	ALLEGATIONS - Excessive Use of Force	ALLEGATIONS - Exercise of Authority	ALLEGATIONS - Unsatisfactory Work Performance	ALLEGATIONS - Other	NOT DEALT WITH (Section 59)	RESOLUTION - Informal (Conduct)	WITHDRAWN	UNSUBSTANTIATED	INFORMAL DISCIPLINE	HEARING	LOST JURISDICTION	OUTSTANDING INVESTIGATIONS (December 2008)
Hamilton	810	147	131	129	2	0	0	29	19	31	30	20	0	0	28	23	7	64	4	0	0	31
Hanover	15	2	2	1	1	0	1	0	1	0	2	0	0	0	0	0	1	1	0	0	0	1
Kawartha Lakes City of (formerly Lindsay)	38	9	8	8	0	0	0	2	2	0	2	2	0	0	4	2	2	0	0	0	0	0
Kenora	35	4	8	8	0	0	0	4	1	1	2	0	0	0	0	1	2	3	0	0	0	2
Kingston	191	23	23	19	0	4	5	10	3	0	6	0	0	0	3	0	4	5	2	0	3	6
LaSalle	35	3	3	3	0	0	0	0	0	3	0	0	0	0	0	0	0	3	0	0	0	0
Leamington	41	6	5	5	0	0	2	1	1	0	0	0	3	0	1	0	0	3	0	0	0	2
London	579	75	90	89	0	1	17	7	16	31	18	10	1	6	9	15	4	31	19	3	5	4
Michipicoten Township	11	1	4	2	2	0	2	0	2	2	0	0	0	0	0	1	0	0	2	0	0	1
Midland	26	1	2	2	0	0	0	0	0	0	2	2	0	0	0	0	0	0	0	0	0	2
Niagara Regional	695	92	83	82	0	1	2	19	25	29	28	19	0	0	10	7	6	42	3	2	0	16
North Bay	92	14	27	26	1	0	0	9	12	0	3	2	0	0	3	0	14	9	0	0	0	1
Ontario Provincial Police	5838	411	435	399	31	5	26	125	267	0	63	217	0	27	144	12	116	498	7	19	0	12
Orangeville	38	5	8	8	0	0	1	2	0	1	4	2	0	0	0	3	3	2	0	0	0	1
Ottawa	1326	247	237	230	6	1	100	0	60	125	45	0	0	0	52	25	36	116	3	0	0	84
Owen Sound	40	5	5	5	0	0	0	2	0	0	2	0	0	0	0	1	2	2	0	0	0	1
Oxford Community	83	7	8	8	0	0	0	2	0	0	3	2	1	0	0	0	0	6	1	0	0	1
Peel Regional	1814	84	57	57	1	1	16	10	1	26	16	4	0	0	61	32	5	13	1	1	0	11

2008 Police Services	Total Officers subject to Part V	TOTAL PUBLIC COMPLAINTS 2007	TOTAL PUBLIC COMPLAINTS 2008 (NEW)	TOTAL PUBLIC COMPLAINTS – CONDUCT	TOTAL PUBLIC COMPLAINTS – SERVICE	TOTAL PUBLIC COMPLAINTS – POLICY	PUBLIC COMPLAINTS CARRIED FROM PREVIOUS YR 2006	ALLEGATIONS - Incivility	ALLEGATIONS - Neglect of Duty	ALLEGATIONS - Discreditable Conduct	ALLEGATIONS - Excessive Use of Force	ALLEGATIONS - Exercise of Authority	ALLEGATIONS - Unsatisfactory Work Performance	ALLEGATIONS - Other	NOT DEALT WITH (Section 59)	RESOLUTION - Informal (Conduct)	WITHDRAWN	UNSUBSTANTIATED	INFORMAL DISCIPLINE	HEARING	LOST JURISDICTION	OUTSTANDING INVESTIGATIONS (December 2008)
Pembroke	29	3	3	3	0	0	0	0	0	3	0	0	0	0	0	0	0	3	0	0	0	0
Perth	15	1	3	3	0	0	0	1	1	0	0	1	0	0	0	2	0	1	0	0	0	0
Peterborough Lakefield	125	23	22	22	0	0	7	0	16	6	0	0	0	0	2	2	6	4	7	1	0	3
Port Hope	25	2	1	1	0	0	1	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0
Sarnia	111	15	15	14	1	0	2	1	6	0	7	2	1	0	2	1	2	4	0	0	0	8
Saugeen Shores	20	1	2	2	0	0	1	0	0	0	0	0	0	2	0	0	0	1	1	0	0	0
Sault Ste. Marie	138	13	12	12	0	0	6	2	3	0	1	6	0	0	2	0	1	6	0	0	0	3
Shelburne	12	4	3	3	0	0	0	0	0	2	0	0	0	1	0	0	1	1	1	0	0	0
Smiths Falls	25	6	7	5	2	0	0	0	1	0	4	0	0	2	0	0	1	2	1	0	0	3
South Simcoe	75	8	5	5	0	0	0	1	1	3	0	0	0	0	1	1	0	2	1	0	0	0
St. Thomas	65	4	4	3	1	0	3	1	3	0	0	0	0	0	1	0	1	2	0	0	0	0
Stirling Rawdon	8	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Stratford	55	4	2	2	0	0	1	0	1	1	0	0	0	0	1	0	0	0	1	1	0	0
Strathroy Caradoc	30	0	1	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1
(Greater) Sudbury Regional	255	52	28	28	0	0	8	13	6	0	3	2	0	2	2	0	11	8	1	1	0	1
Thunder Bay	222	44	59	55	4	0	0	8	4	25	5	11	0	6	16	0	15	16	4	0	0	4
Timmins	84	14	13	11	2	0	0	4	2	1	2	0	0	2	3	3	2	4	0	0	0	1
Toronto	5457	686	756	433	1	7	126	109	44	166	89	18	0	7	315	50	75	108	8	0	1	195

2008 Police Services	Total Officers subject to Part V	TOTAL PUBLIC COMPLAINTS 2007	TOTAL PUBLIC COMPLAINTS 2008 (NEW)	TOTAL PUBLIC COMPLAINTS – CONDUCT	TOTAL PUBLIC COMPLAINTS – SERVICE	TOTAL PUBLIC COMPLAINTS – POLICY	PUBLIC COMPLAINTS CARRIED FROM PREVIOUS YR. 2006	ALLEGATIONS - Incivility	ALLEGATIONS - Neglect of Duty	ALLEGATIONS - Discreditable Conduct	ALLEGATIONS - Excessive Use of Force	ALLEGATIONS - Exercise of Authority	ALLEGATIONS - Unsatisfactory Work Performance	ALLEGATIONS - Other	NOT DEALT WITH (Section 59)	RESOLUTION - Informal (Conduct)	WITHDRAWN	UNSUBSTANTIATED	INFORMAL DISCIPLINE	HEARING	LOST JURISDICTION	OUTSTANDING INVESTIGATIONS (December 2008)
Waterloo Regional	717	66	77	73	2	2	6	42	23	49	35	18	0	8	13	19	1	24	14	0	0	10
West Grey (formerly Town of Durham)	20	3	1	1	0	0	0	1	0	0	0	0	0	0	0	0	0	1	0	0	0	0
West Nipissing	20	4	7	7	0	1	2	0	6	1	0	0	0	0	1	0	0	7	0	0	0	1
Windsor	473	87	76	54	6	3	17	28	32	25	17	3	0	8	7	19	8	19	8	4	0	24
Wingham	7	2	1	1	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	0
York Regional	1364	131	111	109	0	2	80	21	18	34	19	17	0	0	12	32	8	11	0	0	0	48
SERVICES DISBANDED DURING 2008	2																					
Kenora Police Service																						
Essex Police Service																						
TOTALS	23661	2623	2644	2220	65	40	464	479	647	697	454	378	14	82	741	285	426	1126	98	35	11	515

REVIEWS REQUESTED BY COMPLAINANTS **
2004 – 2008

2004	**562**
2005	**569**
2006	**546**
2007	**553**
2008	**568**

***Source: Ontario Civilian Commission on Police Services*

OCCPS REVIEW STATISTICS
2004 - 2008

	2004	2005	2006	2007	2008
Total Complaints Reported in Ontario*	3110	2868	2613	2623	2,583
Reviews by OCCPS	**562**	**569**	**546**	**553**	**568**
Decisions Varied:	126	128	110	116	97
% Varied	22%	22%	20%	20%	17%
Hearings Ordered	18	14	13	18	5
Less Serious Misconduct	13	4	8	5	-
Further Investigation	67	74	61	60	49
Varied Classification	28	33	28	19	13
Less Serious to No Misconduct		3			-
No jurisdiction				24	12
Other					8

*As self-reported by Police Service

First Nations Policing

The Constitution Act, 1867, assigned responsibility for the administration of justice to the provinces. Constitutionally and legislatively, Ontario is responsible for the delivery of policing services in all parts of the province, including First Nations.

In 1975, the Task Force on Policing led to the establishment of a tripartite arrangement for funding the Ontario First Nations Policing Agreement. The Ontario Provincial Police (OPP) administer the program and provide support. There has been a gradual transfer of administrative responsibility from the OPP to First Nations governing authorities. Some of the functions, which previously had been the exclusive responsibility of the OPP, have become jointly administered; others have been assumed completely by First Nations.

Section 54 of the Police Services Act, states that, "with the Commission's approval, the Commissioner may appoint a First Nations Constable to perform specific duties" and further, "if the specified duties of a First Nations Constable relate to a reserve as defined in the Indian Act (Canada), the appointment also requires the approval of the reserve's governing authority or band council."

First Nations Police are responsible for enforcing provincial and federal laws and band bylaws in First Nations Territories.

In 2008, there were 501 First Nations Constables serving. During the year, the Commission approved 51 First Nations Special Constable appointments.